SUPREME COURT, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. ~~1175~~

DOROTHY HINCHCLIFF,

Petitioner,

v.

JAMES M. CLARKE, FRANK S. TURBETT, JR., and UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

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PETITION FOR A WRIT OF CERTIORARI To the United States Court of Appeals For the Sixth Circuit.

Dorothy Hinchcliff, your petitioner, individually and as executrix of the estate of Alfred W. Hinchcliff, deceased, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in this case on January 19, 1967, which reversed a judgment entered by the United States District Court for the Northern District of Ohio (Eastern Division) and ordered the case remanded to the District Court for further proceedings consistent with the opinion of the Court of Appeals.

OPINIONS BELOW.

The opinion of the District Court (Appendix A, *infra*, pp. 1a-9a), allowing the petitioner time within which to intervene in the proceedings before the United States Commissioner, but overruling the petitioner's motion for a preliminary injunction, is reported at 205 F.Supp. 1.

The opinion of the District Court, filed August 1, 1963 (Appendix A, *infra*, pp. 9a-25a), on the merits of the case, is reported at 230 F.Supp. 91. The subsequent opinion of the District Court, on reconsideration, filed May 13, 1964 (Appendix A, *infra*, pp. 25a-49a), is reported in 230 F.Supp. at 99.

The opinion of the Court of Appeals, filed January 19, 1967 (Appendix A, *infra*, pp. 54a-62a), has not yet been reported.

JURISDICTION.

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on January 19, 1967 (Appendix A, *infra*, p. 62a). The jurisdiction of this Court is invoked under 28 U.S. Code 1254(1).

QUESTIONS PRESENTED.

An Internal Revenue Agent, unarmed with any summons or judicial or administrative process, inspected, removed and photographed records, documents and papers belonging to a taxpayer and pertaining to years extending back to 1945. The inspection, removal and photographing was without the knowledge or consent of the taxpayer. No reopening letter, as required by Section 7605(b) of the Internal Revenue Code of 1954, had been served upon the taxpayer, despite the fact that the years 1956 and prior, back to 1945, as to the taxpayer, had once before been examined, reviewed and closed by the Internal Revenue Service. After making the photographic copies the Revenue Agent returned the records, documents and papers, and thereafter served a summons upon an accountant employed by the taxpayer. The summons directed the accountant to produce for examination all books, records, work papers and files pertaining to the taxpayer for the years 1945 through 1960 inclusive. The date fixed by the summons for appearance and production of the documents was the very date on which the summons was issued and served, notwithstanding the provision in Section 7605(a) of the Internal Revenue Code of 1954 which requires that the date fixed by the summons for appearance of the witness "shall not be less than 10 days from the date of the summons." The questions presented are:

1. Whether the protection guaranteed by the Fourth Amendment of the Constitution against unreasonable searches and seizures, together with the exclusionary rule enunciated in *Weeks v. United States*, 232 U.S. 383, and reaffirmed in *Mapp v. Ohio*, 367 U.S. 643, are applicable to evidence obtained through an illegal search and seizure in an investiga-

tion conducted with a view toward determination and collection of claimed income tax liability.

2. Whether a disavowal by the Government of any intention to institute criminal prosecution, made subsequent to the illegal search and seizure, operates to diminish or destroy the taxpayer's constitutionally protected right to be secure against unreasonable search and seizure, and to take the proceeding outside the reach of the constitutional exclusionary rule, where the Government remains free to seek collection of deficiency assessments and imposition of possible fraud penalties against the taxpayer.

3. Whether enforcement of the summons by the district court would have involved, under the facts of this case, an abuse of that court's process, so that judicial enforcement of the summons was properly denied.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The following constitutional provisions are set forth in Appendix B, *infra*, p. 63a: Fourth and Fifth Amendments of the Constitution of the United States.

The following statutory provisions are set forth in Appendix B, *infra*, pp. 63a-71a: Sections 275 (a) and (c), 276 (a), 293 and 3748 (a) (1) and (2) of the Internal Revenue Code of 1939, Sections 6501 (a), (c) (1) and (e) (1) (a), 6531 (1) and (2), 6653 (a) and (b), 7602, 7604 and 7605 of the Internal Revenue Code of 1954, and Section 4701.19 of the Ohio Revised Code.

STATEMENT.

This case originated (1) upon the filing with the United States Commissioner for the Northern District of Ohio, in a proceeding entitled United States of America v. Donald J. Graf, of an application (R. 15a-16a), under Section 7604(b) of the Internal Revenue Code of 1954, for an order of attachment, seeking enforcement of a summons which had been served by respondent James M. Clarke, an Internal Revenue Agent, upon Graf, an accountant, in which proceeding the petitioner, Dorothy Hinchcliff, individually and as executrix of the estate of her deceased husband, Alfred W. Hinchcliff, moved and was allowed to intervene as a defendant (R. 3a, 26a-27a); and (2) with the filing by petitioner, in both her individual capacity and as executrix of the estate of her husband, of a complaint (R. 30a-36a), in the United States District Court for the Northern District of Ohio, against respondents Clarke (the Internal Revenue Agent) and his superior, the District Director of Internal Revenue for the Cleveland District of Ohio, alleging, *inter alia,* violation of the Fourth Amendment of the United States Constitution and violations of Section 7605(a) and (b) of the Internal Revenue Code of 1954, and asking the court to restrain the defendants, their successors, deputies, agents and employees from further prosecution of the investigation of the income tax matters of petitioner individually, and of the estate of her deceased husband, and to restrain them from gaining access to the records summonsed from Graf, and to quash the summons.

Thereafter, upon application of the U.S. Commissioner, the proceedings in United States of America v. Graf were certified and transferred to the District Court (R. 4a, 61a). Both cases were then consolidated for hear-

ing and determination by the District Court (R. 113a-114a). The basic facts out of which the proceedings arose now follow.

Petitioner and her husband, Alfred W. Hinchcliff, filed separate income tax returns for the years 1945 and 1946, and joint returns for the years 1947 and subsequent (R. 316a). Mr. Hinchcliff died in May of 1959 (R. 160a), and Mrs. Hinchcliff was appointed executrix of her husband's estate the following month (R. 163a).

Donald J. Graf had been hired by the Hinchcliffs in 1951 to do their bookkeeping, and he kept the only books that were kept for the Hinchcliffs (R. 358a). The first of the income tax returns which Graf filed for the Hinchcliffs was that for the calendar year 1950, filed in 1951 (R. 340a). Subsequently, in January 1952, Graf received his certificate as a certified public accountant (R. 340a).

In the early part of 1961, Revenue Agent Clarke[1] called the Hinchcliffs' attorney, Clyne, and told Clyne, that he had been assigned to exmine the Hinchcliff tax returns for the years 1957, 1958 and 1959 (R. 251a, 253a). Agent Clarke told the attorney that he was only interested in those three years (R. 251a).

Agent Clarke subsequently called the accountant, Graf, and stated that he wanted to examine the Hinchcliff returns for the "open" years (R. 145a). Graf later told the attorney, Clyne, after Agent Clarke's first visit to Graf's office, that Clarke was interested in a large difference in rental income between the years 1957 and 1958 (R. 149a).

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[1] It is worth noting that Agent Clarke in his *testimony* on at least two occasions, once on direct and again on cross examination, described himself as a "special revenue agent" (R. 185a, 199a). In his earlier testimony, however, as well as subsequent, Clarke identified his occupation simply as that of "Internal Revenue Agent" (R. 179a, 312a). During the proceedings it was stated by government counsel that "Special Agents deal with the criminal" (R. 313a).

When Graf told Clyne about the examination relating to the year of 1957, Clyne told Graf that the agent had a right to examine back to that year (R. 169a).

During the weeks which followed, Clyne was not kept informed as to the progress of the investigation (R. 170a). Meanwhile, without the knowledge of Clyne or Mrs. Hinchcliff, a significant change in the purpose and scope of the investigation was taking place.

Petitioner and her husband had once before been examined by the Internal Revenue Service for years *prior to* 1957, back to 1945 (R. 60b-61b). Agent Clarke was aware that by statute (Section 7605(b) of the Internal Revenue Code of 1954) he was forbidden to examine any of the Hinchcliffs' books or records, with respect to pre-1957 years, without issuance of a reopening letter (R. 319a). Agent Clarke was also aware that he had no such reopening letter (R. 319a). Clarke nevertheless asked Graf for copies of the Hinchcliffs' tax returns for those prior years (R. 317a).

The Hinchcliffs' tax returns for the years 1945 through 1949 had not been prepared by Graf, and Graf stated that the copies of those returns were not his property (R. 143a). When the attorney, Clyne, first learned that Clarke wanted records and papers going back to 1945, Clyne instructed Graf that he had no right to discuss the matter and no right to turn the papers over to Clarke (R. 170a). When Clyne told Graf not to assist the government in any way, shape or form, Graf replied that Clyne should not tell him how to conduct his practice, that he held a Treasury Card and knew his obligations (R. 150a).

Despite the fact that no summons had been issued or served upon him (R. 321a, 344a), Graf turned over a number of records and documents to Agent Clarke on May 3, 1961 (R. 317a). The following records, papers and

documents were thereupon removed from Graf's office by Agent Clarke: copies of the Hinchcliffs' income tax returns for the years 1945, 1946, 1947, 1948, 1949, 1950, 1952 and 1953; and Revenue Agents' Reports of previous examinations of the Hinchcliffs covering the years 1948 though 1953 (R. 294a). Clarke also took the accountant's worksheets for each of the years 1951 through and including 1958 (R. 294a-295a, 297a).

On or about May 5, 1961, Clarke caused photostatic copies of all the foregoing records, papers and documents to be made at the local office of the Internal Revenue Service (R. 247a-248a, 317a). The papers which Clarke had taken from Graf were returned about May 5 to Graf's office, after the photostatic copies had been made by Clarke (R. 295a, 321a).

Two weeks later, on May 19, 1961, Agent Clarke served a summons upon Graf (R. 127a). The summons by its terms required Graf to appear before Clarke that same day, May 19, to give testimony relating to the tax liability of the Hinchcliffs, and to produce for examination "all books, records, work papers and files pertaining to the above-named taxpayers. These records should include all net worth statements, financial statements, and profit and loss statements, certified or not" (R. 17a). The periods covered were stated on the summons to be the years "1945 through 1960 inclusive" (R. 17a). At Clarke's direction, the summons was typed up by Graf's secretary and was then signed by Clarke (R. 249a).

Agent Clarke admitted that the summons called for production of the same records of which Clarke had already made copies (R. 321a).

When the summons was served on Graf he produced all the books, records and papers called for and showed them to Agent Clarke who looked at them (R. 129a-130a),

put them in various envelopes on which he initialed or signed his name (R. 303a) and then "grabbed them up" and put them in a box (R. 323a). Prior to May 19 and the foregoing events, petitioner and her attorney had demanded that Graf return all the books and papers belonging to petitioner and the estate of her husband (R. 133a-134a, 158a). Graf had refused to return them to petitioner despite her demand prior to May 19, 1961 (R. 160a). Agent Clarke was aware, prior to serving the summons upon Graf, that demand had been made for the return of all of the Hinchcliff books and records (R. 183a). Clarke did not talk with petitioner or her attorney about the summons either before or after it was issued (R. 219a).

Included among the numerous papers, records and documents produced by Graf on May 19, in response to the summons served upon him that day, were papers which Graf had never used, and which had nothing to do with income tax returns, and which Graf himself had never seen until after Mr. Hinchcliff's death (R. 54b-55b). Also included were such items as correspondence with third persons, including a lawyer, as well as other papers, computations and statements relating to estate and estate tax planning for the future, with respect to the Hinchcliffs, and gifts that should be made in the future (R. 56b-59b).

Agent Clarke had already made substantial use of the evidence which he had previously taken from Graf and photographed. Clarke took figures off of the tax returns in order to make up the net worths which he prepared (R. 335a). Clarke admitted that he further used the copies of the tax returns, which he had photographed, to compare with his net worth computations in order to arrive at his conclusion that income was understated for closed years (R. 221a-222a, 225a-232a, 234a-235a, 238a-241a).

It was also admitted by Agent Clarke that the letters which he wrote to third parties in connection with the Hinchcliffs' alleged tax liability, including such liability for closed years (*i.e.*, pre-1957 years), were written by him *after* he took possession of the copies of the tax returns from Graf (R. 333a-334a). Clarke further admitted that the letters which he sent to Washington and to his superiors, in connection with the alleged tax liability of the Hinchcliffs, contained information which resulted from his examination of the copies of the returns which he took from Graf and the photostatic copies which Clarke had made of them (R. 334a).

After Graf produced the books, records and papers in response to the summons on May 19, and Agent Clarke examined them and placed them in various envelopes, they were then placed in boxes and sealed by Clarke and left in Graf's office (R. 150a-151a, 222a).

On May 24, 1961 (R. 1a), the application for an order of attachment, seeking enforcement of the summons, was filed in the proceeding entitled United States of America vs. Donald J. Graf (R. 15a-22a). A writ of attachment issued, and the records and documents were ordered impounded (R. 1a, 23a-24a).

The District Court found "that the testimony of the accountant and the agent (Clarke) clearly establishes that prior to the issuance of the summons the agent examined all and copied some of the documents and data which are the property of the taxpayers, and further clearly establishes that the summons sought the production of documents of the taxpayers, which documents clearly come within the limitations of Section 7605 (a) and (b) of Title 26, U.S.C.A." (Appendix A, *infra*, p. 16a).

The District Court further found "that prior to and including May 19, 1961, the agent pursued a course of

action which he knew, or should have known, was partially if not wholly illegal, and that he did so with complete disregard of his duty to ascertain the propriety or legality of his actions." (Appendix A, *infra*, p. 19a).

The court stated that the agent's examination and photographing of the papers which recorded the business and tax affairs of the taxpayers for the years 1945 to 1956, which the taxpayers or their employees had turned over to the accountant during that period, as well as the agent's examination of such papers in the course of the proceedings before the United States Commissioner, was improper and illegal because the taxpayers had not been served with a reopening letter as required by Section 7605(b) of the Internal Revenue Code of 1954 (Appendix A, *infra*, p. 20a). The court further stated that the application for an order enforcing the summons issued to the accountant was void and unenforceable because the summons did not meet the requirement of subsection (a) of Section 7605 (Appendix A, *infra*, p. 20a).

The District Court, moreover, found that the question was presented whether the documents and papers which were taken by Agent Clarke were taken in such a manner as to constitute an unreasonable search and seizure (Appendix A, *infra*, p. 32a). The court was of the opinion that they were (Appendix A, *infra*, p. 32a). The court found that the inspection, removal and copying of the taxpayers' papers which related to the years prior to 1957 was an unconstitutional search and seizure of the taxpayers' property in violation of the Fourth Amendment of the United States Constitution (Appendix A, *infra*, p. 27a).

The District Court denied the application for enforcement of the summons, and the summons was vacated (Appendix A, *infra*, pp. 49a-50a). The court, however, also denied petitioner's request for an injunction against

investigation of her income tax liabilities and those of her decedent (Appendix A, *infra*, p. 50a).

The District Court found that because of the violations committed by Agent Clarke, a proper sanction would be the suppression of all the papers and records for the years prior to 1957, and information acquired therefrom, which Clarke took from the accountant's office on May 3, 1961 (Appendix A, *infra*, p. 27a). Thus, the items of evidence which the court ordered suppressed are those "for the years 1945 to 1956, inclusive" (Appendix A, *infra*, pp. 50a-51a). The Government was barred from using the evidence in any proceeding and from reacquiring it by any means (Appendix A, *infra*, p. 51a).

The Court of Appeals reversed (Appendix A, *infra*, p. 62a). The court was apparently persuaded that "in the instant case we do not deal with a 'criminal proceeding.'" (Appendix A, *infra*, p. 61a). The court noted that the District Judge had placed reliance on *Boyd v. United States*, 116 U.S. 616, and that he had apparently held the doctrine of *Boyd* effective in relation to a search for evidence in a civil proceeding for determination of income tax (Appendix A, *infra*, pp. 60a-61a). The Court of Appeals disagreed. "We decline to extend the *Boyd* doctrine to bar an administrative summons for financial records relevant to a civil proceedings for collection of income tax * * *." (Appendix A, *infra*, p. 61a).

The Court of Appeals emphasized that the Internal Revenue Service "seeks to assure this court (as it did the District Judge) that its investigation in the Hinchcliff matter has no purpose of possible criminal prosecution." (Appendix A, *infra*, p. 61a). The Court of Appeals declared that "our decision in this case is squarely planted upon the representation made to us. Hence, no information secured as a result of this decision may be employed in any criminal prosecution." (Appendix A, *infra*, p. 61a).

REASONS FOR GRANTING THE WRIT.

I.

The decision below should be reviewed because it involves extremely important questions of federal law which have never been directly passed upon by this Court and which should be finally settled by this Court.

As various federal courts have observed, the Supreme Court has never directly passed upon the question whether unconstitutionally seized evidence is inadmissible in a federal tax proceeding, nor upon the broader question of whether illegally obtained evidence is admissible in a civil proceeding. See, for example, *Compton v. United States,* 334 F.2d 212, 217 (4th Cir. 1964), and *Lassoff v. Gray,* 207 F.Supp. 843, 846 (W.D. Ky. 1962). It has also been observed, in *Lassoff v. Gray,* that statements in certain of the Supreme Court's opinions are adaptable to the conclusion that such evidence may be considered inadmissible in civil cases. 207 F.Supp. at 846.

The leading case on the subject of search and seizure is *Boyd v. United States,* 116 U.S. 616. *Boyd* was not a criminal case, but was one wherein the United States sought a forfeiture of goods which had allegedly been imported without payment of the customs duty. The proceeding was instituted under a statute which required the defendant to produce certain records which would aid the Government in proving its case for forfeiture, on pain of having the refusal to produce such documents taken as evidence of guilt. The question before this Court in *Boyd* was whether the compulsory production of a man's private papers for their evidentiary use against him in a proceeding to forfeit his property for alleged fraud against the revenue laws constituted an unreasonable search and seizure within the meaning of the Fourth Amendment of the Constitution. The Court held that the

Fourth Amendment applied and barred such attempted seizure. The Court stated as follows:

> "Reverting then to the peculiar phraseology of this Act and to the information in the present case, which is founded on it, we have to deal with an Act which expressly excludes criminal proceedings from its operation, although embracing civil suits for penalties and forfeitures, and with an information not technically a criminal proceeding, and neither, therefore, within the literal terms of the Fifth Amendment to the Constitution any more than it is within the literal terms of the Fourth. Does this relieve the proceedings or the law from being obnoxious to the prohibitions of either? We think not; we think they are within the spirit of both." 116 U.S. at 633.

The Court further declared:

> "As, therefore, suits for penalties and forfeitures, incurred by the commission of offenses against the law, are of this quasi criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the Fourth Amendment of the Constitution * * *." 116 U.S. at 634.

In the instant case the District Judge noted that the forfeiture sought in *Boyd, supra*, was a civil action highly analogous to a modern civil tax action which seeks to recover a deficiency assessment and possible fraud penalties, and that the Government admits that it seeks to institute such an action against petitioner (Appendix A, *infra*, pp. 31a-32a). The District Judge stated that where the Government is seeking to take private property in a civil tax action the shield of the Fourth Amendment's protection is no less available to the citizen than it would be in a criminal prosecution arising from the same facts, citing *Boyd v. United States, supra* (Appendix A, *infra*, pp. 30a-31a).

It is apparent that the possible penalties for fraud, even in a "civil proceeding," are substantial. Section 293(b) of the Internal Revenue Code of 1939 and Section 6653(b) of the Internal Revenue Code of 1954 authorize the imposition of penalties amounting to 50 percent of the deficiency, or underpayment, by way of additions to the taxes to be collected.

Moreover, Section 276(a) of the Internal Revenue Code of 1939 and Section 6501(c)(1) of the Internal Revenue Code of 1954 both provide that in the case of a false or fraudulent return with intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, *at any time.* (Emphasis supplied.)

The constitutional exclusionary rule was enunciated in the landmark case of *Weeks v. United States,* 232 U.S. 383, wherein this Court held that in a federal prosecution the Fourth Amendment barred the use of evidence secured through an illegal search and seizure. The Court stated as follows:

> "The effect of the 4th Amendment is to put the courts of the United States and federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers, and effects, against all unreasonable searches and seizures under the guise of law. *This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all intrusted under our Federal system with the enforcement of the laws."* 232 U.S. at 391-392. (Emphasis supplied.)

Specifically dealing with the use of the evidence unconstitutionally seized, the Court in *Weeks, supra,* declared:

> "If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the 4th Amendment, declaring his right to be secure against such searches and seizures, is of no value and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land." 232 U.S. at 393.

The Court concluded that use of the seized evidence involved "a denial of the constitutional rights of the accused." *Id.* at 398.

The case of *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, arose out of an illegal search and the seizure of records of a corporation while two of its officers who had been indicted were being detained following their arrest. Photographs and copies of material papers were made and a new indictment was framed based upon the knowledge thus obtained. Application was made for the return of the records unlawfully taken and the district court ordered the originals returned but impounded the photographs and copies. Subpoenas to produce the originals then were served and the district court ordered the defendants to comply, although it had previously found that all of the papers had been seized in violation of the parties' constitutional rights. The order of the district court was reversed by the Supreme Court. In an opinion by Mr. Justice Holmes, the Court stated as follows:

> "The government now, while in form repudiating and condemning the illegal seizure, seeks to maintain its right to avail itself of the knowledge obtained by that means which otherwise it would not have had." 251 U.S. at 391.

The Court continued:

> "The proposition could not be presented more nakedly. It is that although of course its seizure was an outrage which the government now regrets, it may study the papers before it returns them, copy them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them; that the protection of the Constitution covers the physical possession, but not any advantages that the government can gain over the object of its pursuit by doing the forbidden act." *Ibid.*

The Court, in *Silverthorne Lumber Company, supra,* declared that such is not the law, and that it would reduce the Fourth Amendment "to a form of words." The Court cited the case of *Weeks v. United States,* 232 U.S. 383, and then continued as follows:

> "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the government's own wrong cannot be used by it in the way proposed." 251 U.S. at 392.

This Court has emphasized that the restrictions upon searches and seizures were designed for protection against official invasion of privacy and the security of property, and that the exclusionary rule relating to evidence gathered in violation of the Fourth Amendment is a means for making effective the protection of privacy. *Jones v. United States,* 362 U.S. 257, 261.

In *Mapp v. Ohio,* 367 U.S. 643, 656-657, the Court termed the exclusion doctrine "an essential part of the right to privacy" and held the exclusionary rule to be "an essen-

tial part of both the Fourth and the Fourteenth Amendments."

Even more recently, this Court had before it for consideration the question of whether the constitutional exclusionary rule enunciated in *Weeks v. United States, supra,* and *Mapp v. Ohio, supra,* was applicable in state proceedings for the forfeiture of an automobile used for the illegal transportation or possession of liquor. *One 1958 Plymouth Sedan v. Pennsylvania,* 380 U.S. 693. Even though the highest court of Pennsylvania had deemed the proceeding "civil" in nature, this Court held that where such forfeiture proceedings require a determination that the criminal law has been violated, and where the forfeiture is a penalty for a criminal offense, the constitutional exclusionary rule *does* apply to such forfeiture proceedings. *One 1958 Plymouth Sedan v. Pennsylvania, supra.*

The teachings of this Court's great decisions starting with *Boyd, supra,* in 1886, and more fully developed through the years in *Weeks, Silverthorne Lumber Co., Mapp* and, in 1965, *One 1958 Plymouth Sedan, supra,* point unmistakably to the conclusion that the protection guaranteed by the Fourth Amendment against unreasonable searches and seizures, together with the constitutional exclusionary rule, are not to be confined to proceedings purely criminal in nature. The reasoning which underlies those decisions and the philosophy so well articulated by this Court in those cases compel the conclusion that the Fourth Amendment's protection of the right to privacy and freedom from unwarranted governmental interference is equally applicable in civil cases where property loss to the citizen is the object of the Government's efforts.

This view of the broad scope of the protection afforded by the Fourth Amendment was followed by the

District Judge in his scholarly and carefully reasoned opinion (Appendix A, *infra*, pp. 30a-32a). The Court of Appeals, in repudiating this view, has adopted a retrograde stance. Time has set its face against so narrow an interpretation of Fourth Amendment rights as that applied by the Court of Appeals.

Because the decision below involves such important questions of constitutional law which have never been squarely passed upon by this Court and which demand final and authoritative resolution, the decision of the Court of Appeals should be reviewed.

II.

The decision of the Court of Appeals for the Sixth Circuit in the present case is in conflict, on the constitutional principles involved, with the decisions of other courts of appeals.

The decision below is in conflict with the decision of the Court of Appeals for the Ninth Circuit in *Goodman v. United States*, 369 F.2d 166 (9th Cir. 1966). In *Goodman* the plaintiffs brought a civil action seeking to compel the return of their records and documents and to suppress their use as evidence. It was claimed by plaintiffs that agents of the Internal Revenue Service had induced plaintiffs to surrender their records by a scheme of fraud and deception. Such a scheme being unlawful, they argued, the taking of their records was violative of the Fourth Amendment. The district court accepted jurisdiction but dismissed the complaint on the merits.

The Court of Appeals in *Goodman, supra*, reversed. That court recognized that it was not dealing with a criminal case: "(T)here is, and has been, no criminal case pending in any stage." 369 F.2d at 168. The court nevertheless held that if the searches or seizures were

found to be unlawful, as having violated the Fourth Amendment, the plaintiffs were entitled not only to the return of the originals of their records, but also to have turned over to them the copies which had been made of those documents. *Id.* at 168.

The decision below also conflicts in principle with the decision of the Court of Appeals for the First Circuit in *Rogers v. United States,* 97 F.2d 691 (1st Cir. 1938). *Rogers* involved a civil action (assumpsit) by the United States to recover customs duties on liquors imported into the United States. The defendant on appeal assigned as error the admission of certain evidence obtained by government officials as the result of an unlawful search of the defendant's premises and the seizure of the liquors found therein. He contended that evidence obtained by the government in violation of the Fourth Amendment could not be used either in a civil or in a criminal suit. The government replied that the illegality of the manner by which the evidence is secured is not material in a civil case.

The Court of Appeals in *Rogers, supra,* citing the doctrine of *Silverthorne Lumber Co. v. United States,* 251 U.S. 385, declared that if a writ of subpoena is rendered invalid because of the use in framing it of evidence obtained by the government in violation of the Fourth Amendment, then for the same reason a judgment in a civil cause, in the procurement of which evidence thus illegally obtained is used, is likewise rendered invalid. 97 F.2d at 692. The court of appeals therefore held that the lower court erred in admitting the evidence illegally obtained. The judgment of the district court was vacated and the verdict set aside. *Id.* at 692.

Because of the conflict on important constitutional principles between the decision of the Court of Appeals

for the Sixth Circuit in the present case and the decisions of the Court of Appeals for the Ninth Circuit in *Goodman v. United States, supra,* and of the Court of Appeals for the First Circuit in *Rogers v. United States, supra,* and in order to resolve such conflict, the decision below should be reviewed.

III.

The questions presented by this case, particularly as they pertain to the Government's attempt to secure enforcement of the summons, are of great and recurring significance in the administration of the Internal Revenue laws.

The Court of Appeals in the instant case recognized the fact that the summons did not follow the 10-day notice rule of Section 7605(a) of the Internal Revenue Code of 1954 (Appendix A, *infra,* p. 62a). The Court of Appeals also conceded that pre-1957 years, as to petitioner and her deceased husband and his estate, had previously been reviewed and closed, and that no letter informing petitioner of intention to reopen had been sent by the Government (Appendix A, *infra,* p. 57a). Nevertheless, the Court of Appeals reversed the judgment of the district court (Appendix A, *infra,* p. 62a).

In thus reversing the district court, the Court of Appeals ignored the important admonition contained in the Supreme Court's opinion in *United States v. Powell,* 379 U.S. 48. In *Powell,* this Court stated that in order to obtain enforcement of his summons, the Commissioner of Internal Revenue must show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the

Code have been followed—in particular, that the "Secretary or his delegate," after investigation, has determined the further examination to be necessary and has notified the taxpayer in writing to that effect. 379 U.S. at 57-58.

The Court, in *Powell, supra*, further cautioned that it is the district court's process which is invoked to enforce the administrative summons and a court may not permit its process to be abused. *Id.* at 58.

It is submitted that when facts such as those here involved are brought to the attention of a district court, as they were in the present case, enforcement of the summons would necessarily involve an abuse of the district court's process. Judicial enforcement of such summons is therefore properly denied.

CONCLUSION.

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

OPINIONS AND ORDERS OF THE COURTS BELOW.

MEMORANDUM OF DISTRICT COURT ON MOTION FOR PRELIMINARY INJUNCTION.

(Caption Omitted.)

KALBFLEISCH, J.

This is a civil action brought by the plaintiff, individually and in her capacity as Executrix of the Estate of her deceased husband, Alfred W. Hinchcliff, against James M. Clarke, Internal Revenue Agent, and Melvin J. Burton, District Director of Internal Revenue, Cleveland, Ohio, District, seeking a preliminary injunction immediately and, upon final hearing, that the preliminary injunction be made perpetual, restraining the defendants, their successors, deputies, agents and employees, and all persons acting by, through or under them, or any of them, or by or through their order, from further prosecution of the investigation of the income tax matters of this plaintiff, individually, and of the estate of plaintiff's deceased husband, Alfred W. Hinchcliff; that they be further restrained from gaining access to the summoned records by agreement forced or acquiesced in by Donald J. Graf; and that the summons issued in this investigation be quashed.

Upon the evidence submitted, the Court finds that the plaintiff, Dorothy Hinchcliff, is the widow of Alfred W. Hinchcliff, and was duly appointed Executrix of the Estate of Alfred W. Hinchcliff, deceased, on the 16th day of June, 1959, and presently is serving in that capacity. Joint income tax returns were filed by Dorothy and Alfred W. Hinchcliff from 1945 until the death of Alfred W. Hinchcliff. Subsequent to the death of Alfred W.

Hinchcliff, income tax returns were filed by Dorothy Hinchcliff, individually and as Executrix of the Estate of Alfred W. Hinchcliff, deceased.

From 1951 until the death of Alfred W. Hinchcliff in 1959, Donald J. Graf, a certified public accountant, was employed by Dorothy and Alfred W. Hinchcliff to perform accounting services and to prepare and file income tax returns; and said accountant was employed to perform similar services by Dorothy Hinchcliff, for herself and as Executrix of the Estate of Alfred W. Hinchcliff, until June of 1961.

Prior to May 19, 1961, the Internal Revenue Service had examined some but not all of the income tax returns and records of Dorothy and Alfred W. Hinchcliff for the years 1945 through 1959; and, during April and May of 1961, Internal Revenue Agent James M. Clarke had discussions with the accountant, Donald J. Graf, regarding a reexamination of records and returns previously examined, and also regarding an examination of records and returns not previously examined. Prior to May 19, 1961, Agent James M. Clarke had requested Donald J. Graf, the accountant, to produce records and income tax returns of Dorothy and Alfred W. Hinchcliff for the years 1945 through 1960, which request the accountant felt obliged to grant; however, the accountant advised the plaintiff and her attorney of the request made by the agent and was informed by plaintiff's counsel that the records and returns for the year 1957 should be made available to the agent, but that the agent's request for permission to examine all other records and returns should be refused. The instructions of plaintiff's counsel to the accountant, Donald J. Graf, were communicated to the agent, James M. Clarke, whereupon the agent, James M. Clarke, on May 19, 1961, issued a summons, under authority of 26 U. S. C. A., 7602,

and on the same date served said summons on Donald J. Graf, requiring him to appear before James M. Clarke, an officer of the Internal Revenue Service, to give testimony relating to the tax liability and/or the collection of the tax liability of Alfred W. and Dorothy Hinchcliff for the period 1945 through 1960, inclusive, and to bring with him and produce for examination the following: "All books, records, work papers, and files pertaining to the above-named taxpayers. These records should include all net worth statements, financial statements, and profit and loss statements, certified or not." The summons set the time and place for the appearance of and production of documents by Donald J. Graf for May 19, 1961, at 2:30 P. M., at the said Donald J. Graf's office. Prior to the issuance and service of the summons heretofore described, Dorothy Hinchcliff had requested the accountant to give her the papers and records pertaining to the income tax returns involved, and the accountant refused.

On May 19, 1961, in response to the summons, the accountant, Donald J. Graf, produced at his office the documents named in the summons, and the agent, James M. Clarke, examined them and placed them in containers which the agent sealed; however, the documents were retained by the accountant in deference to the instructions received by him from plaintiff's attorney.

On May 24, 1961—the accountant, Donald J. Graf, not having turned over the records—an application for an order of attachment was filed with the United States Commissioner, Herbert A. Horn, by and through the United States Attorney, under the provisions of 26 U. S. C. A., 7604(b). A hearing was conducted on the application for an order of attachment, and the Commissioner found that the Government was entitled to a writ of attachment, whereupon a writ was issued for the appearance of defend-

ant Donald J. Graf on June 2, 1961, and, on the oral motion of the Assistant United States Attorney, the documents in question were ordered impounded and the defendant restrained from dispossessing himself of the documents. At the hearing on May 24, 1961, Assistant United States Attorney Griffin appeared for the Government and James B. Davis appeared as counsel for the defendant; however, the defendant was not in court.

On June 2, 1961, by consent of the attorneys for the Government and the defendant, the cause was continued to June 13, 1961, and on June 13, 1961, a motion to quash and vacate the writ of attachment was filed by defendant. W. D. Hopkins and John J. Kane appeared for the defendant and the hearing was passed to June 23, 1961.

On June 23, 1961, the plaintiff herein, being represented by Attorney William Patrick Clyne, presented for the consideration of the United States Commissioner a motion to quash and vacate the writ of attachment and restraining order, and the cause was continued to July 10, 1961. The order of May 24, 1961, was continued in force. On June 23, 1961, the motion of Donald J. Graf, filed with Commissioner Horn on June 13, 1961, to quash and vacate the writ of attachment, was overruled. On July 10, 1961, the entry of June 23, 1961, overruling the motion of defendant to quash and vacate the writ of attachment, was vacated and the case was continued to July 31, 1961, with the order impounding and restraining the dispossession of the documents by the defendant continued in force.

On July 31, 1961, prior to the time set for the hearing before United States Commissioner Horn, the plaintiff instituted this action for an injunction by the filing of the complaint herein. Although the plaintiff in this injunction proceeding has presented for the consideration of the Commissioner a motion to quash and vacate the writ of

attachment issued by the Commissioner on May 24, 1961, the plaintiff has made no effort to intervene in the proceeding before the Commissioner. See *In Re Foster*, 159 F. Supp. 444 (S. D. N. Y., 1958); aff'd. *Foster v. United States*, 265 F. 2d 183 (C. A. 2, 1959). (But see concurring opinion of Judge Lombard on the matter of intervention.) Therefore, the plaintiff is not a party to the action pending before the Commissioner, wherein the United States is plaintiff and Donald J. Graf is defendant.

The plaintiff insists that she has a vital interest in the proceeding before the Commissioner and that her rights and privileges, as guaranteed by the Fourth and Fifth Amendments of the Constitution, will be invaded if the action before the Commissioner is not enjoined. The plaintiff herein further insists that the summons issued by Internal Revenue Agent James M. Clarke to the accountant, Donald J. Graf, was void in that it did not comply with the provisions of 26 U. S. C. A., 7605(a). The plaintiff further insists that United States Commissioner Herbert A. Horn has no jurisdiction in the matter before him and that there is no appeal from any decision which Commissioner Horn may render, thus leaving no adequate remedy at law for this plaintiff individually and as Executrix of the Estate of her deceased husband.

The plaintiff asserts that Donald J. Graf originally felt obliged to obey the summons but cooperated with the taxpayer (plaintiff herein) by raising objections to the proceedings before the United States Commissioner and filing a motion to quash the summons issued by the Internal Revenue Service, but that Graf presently has changed his attitude toward plaintiff and will not object to said proceedings and has withdrawn his motion to quash the summons previously filed. The evidence leaves no doubt as to the accuracy of this assertion; however, the truth or falsity

of the assertion is inconsequential in determining the remedies sought by plaintiff.

James M. Clarke and Melvin J. Burton, defendants herein, oppose the plaintiff's motion for a preliminary injunction and, through Burt W. Griffin, Assistant United States Attorney, answer the allegation in plaintiff's motion by denying the foregoing assertions of the plaintiff; and the defendants affirmatively assert that the plaintiff has no standing to challenge the validity of the summons issued on May 19, 1961, and that the plaintiff has no standing to raise the Fourth Amendment as a bar to enforcement of the summons of May 19, 1961.

Plaintiff's contention that the United States Commissioner has no jurisdiction to entertain the proceedings now before him cannot be sustained. The power and jurisdiction of United States Commissioners are set out in various statutes throughout the Code and "the relations between them and the District Courts vary as do their official acts." *Go-Bart Co. v. United States,* 282 U. S. 344, 353. Under certain circumstances United States Commissioners are even authorized to try persons charged with petty offenses. (18 U. S. C. A., 3401.) In the Court's judgment, the language of 26 U. S. C. A., 7604(b), under which the Commissioner is proceeding at the instance of the Government, gives the Commissioner specific powers which are co-equal with those of District Judges as to the enforcement of summonses issued under 26 U. S. C. A., 7602, as well as under 26 U. S. C. A., 6402(e)(2) and 6421(f)(2). The Commissioner, of course, will afford all parties properly before him the opportunity to be heard on such objections and motions as they may care to make, and in reaching his decisions will apply the relevant statutes and conduct the hearing in accord with the law.

Counsel for neither side has cited a case wherein

enforcement proceedings under Section 7604(b) (or similar provisions in 26 U. S. C. A., 3615(e), of the 1939 Code) had been taken before a United States Commissioner. Since the hearing, the Court has endeavored to make an exhaustive search and was unable to find such a case. All of the reported cases involving 7604(b) arose out of applications for enforcement proceedings made to the District Judge rather than to the United States Commissioner. However, since 7604(b) clearly gives the United States Commissioner the power, the fact that heretofore it has been invoked infrequently—or not at all—is no bar to its now being exercised. As Mr. Justice Jackson said in *United States v. Morton Salt Co.*, 338 U. S. 632, at pages 647, 648:

> "The fact that powers long have been unexercised well may call for close scrutiny as to whether they exist; but if granted, they are not lost by being allowed to lie dormant, any more than non-existent powers can be prescripted by an unchallenged exercise. We know that unquestioned powers are sometimes unexercised from lack of funds, motives of expediency, or the competition of more immediately important concerns."

Whatever rights of, or procedures for, appeal may exist with respect to actions taken by the United States Commissioner under 7604(b) need not be considered by this Court as the matter is now pending before him for decision; however, since final orders of a District Judge under 7604(b) are appealable, it would be strange indeed if similar orders of United States Commissioners under the same statute were not also appealable, especially in view of the fact that enforcement proceedings under 7604(b) are said to comprise "an independent judicial proceeding which is characterized as a case or controversy." *Hubner*

v. Tucker, 245 F. 2d 35, 39 (C. A. 9, 1957). Furthermore, it would appear that rulings by the Commissioner adverse to the plaintiff, insofar as they might pertain to plaintiff's property which is in Graf's custody, would be appealable. *Perlman v. United States,* 247 U. S. 7; *Schwimmer v. United States,* 272 F. 2d 855 (C. A. 8, 1956). As the Court noted in the *Perlman* case, to hold otherwise would mean that the aggrieved party was "powerless to avert the mischief of the order but must accept its incidence and seek a remedy at some other time and in some other way." Id. p. 13.

The question as to the civil or criminal nature of proceedings under 7604(b) was answered unequivocally in *Sauber v. Whetstone,* 199 F. 2d 520, 523 (C. A. 7, 1952), cert. den. 344 U. S. 928, where it was held that a judgment of contempt for refusal to obey an enforcement order involved civil contempt only.

Plaintiff herein cannot claim the required production by accountant Graf of his own papers (even though they may reflect business transactions by plaintiff, her deceased husband, and his estate) to be an unreasonable search and seizure. *McMann v. S. E. C.,* 87 F. 2d 377, 379 (C. C. A. 2, 1937), cert. den. 301 U. S. 684; *In Re Upham,* 18 F. Supp. 737 (S. D. N. Y., 1937); *Zimmerman v. Wilson,* 105 F. 2d 583 (C. C. A. 3, 1939). The *McMann* and the *Zimmerman* cases, *supra,* were cited with approval by the Sixth Circuit Court of Appeals in *Corbin v. United States,* 244 F. 2d 177 (1957).

Plaintiff is not precluded from asserting her rights and privileges under the Constituiton of the United States and under 26 U. S. C. A., 7605, 6501, and such other statutes as may be relevant, *with respect to property which belongs to her individually, or as executrix,* merely because such

property has been placed in the hands of a third person, Graf.

The proceedings under 7604(b) being properly before the United States Commissioner, the questions raised in the matter before this Court as to plaintiff's constitutional rights and her rights and privileges under the various Revenue statutes must be heard and determined by him under the Federal Rules of Civil Procedure. See Rules ~~24 and~~ 81(a)(3).

Accordingly, the subject proceedings before the United States Commissioner will be ordered to resume, but no earlier than five (5) days after the entry of the order embodying this memorandum in order to allow plaintiff time to intervene in those proceedings to assert her rights, privileges and interests, if she elects to do so.

In all other respects, plaintiff's motion for a preliminary injunction will be overruled.

Should it be required, the Court adopts this memorandum as findings of fact and conclusions of law under Rule 52(a), F. R. C. P.

s/ GIRARD E. KALBFLEISCH,
United States District Judge.

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF DISTRICT COURT.

[Caption Omitted]

(Filed August 1, 1963.)

KALBFLEISCH, *J.*:

This matter is before the Court upon the application of the United States of America for an order to enforce the summons served upon Donald J. Graf by James M.

Clarke, Internal Revenue Agent, pursuant to the provisions of Section 7602, Title 26, U. S. C. A., and upon the motion of Dorothy Hinchcliff, individually, and as executrix of the estate of Alfred W. Hinchcliff, deceased, intervenor herein, to quash and vacate said summons served upon Donald J. Graf, as the same appears upon the Commissioner's Docket No. 12, Case No. 4325. Also before the Court are (1) the complaint of Dorothy Hinchcliff, individually, and as executrix of the estate of Alfred W. Hinchcliff, deceased, praying for an order restraining the defendants, James M. Clarke, Internal Revenue Agent, and Melvin J. Burton, District Director of Internal Revenue, their successors, deputies, agents and employees, and all persons acting through or under them, from further prosecution of the investigation of the income tax matters of the plaintiff, individually, and of the estate of plaintiff's deceased husband, Alfred W. Hinchcliff, restraining the defendants from gaining access to summoned records and quashing a summons served upon Donald J. Graf; (2) the order of this Court, dated November 27, 1961, "that James M. Clarke appear and produce certain documents, records, memoranda and papers"; and (3) the motion of the defendants for an order requiring production of the documents set forth in the original summons to Graf, as well as the supplemental summons served upon Dorothy Hinchcliff on November 8, 1962, subsequent to the reopening letter which was served upon Dorothy Hinchcliff on October 2, 1962.

Alfred W. Hinchcliff and Dorothy Hinchcliff, as husband and wife, filed joint income tax returns for the years 1946 through 1959. Alfred W. Hinchcliff died on May 31, 1959, and Dorothy Hinchcliff was duly appointed executrix of the estate of Alfred W. Hinchcliff on June 16, 1959. Dorothy Hinchcliff, individually, and as executrix of the

estate of Alfred W. Hinchcliff, deceased, will hereafter be referred to as the taxpayers.

Donald Graf, in 1951 and for some period prior thereto, was a self-employed public accountant; and in 1951 he was employed by Alfred W. Hinchcliff to prepare and file the taxpayers' income tax returns and to help them with other accounting matters. In 1951, Mr. Graf passed the required examination, and received his certificate as a certified public accountant in January of 1952.

Mr. Graf, hereinafter referred to as the accountant, supervised the bookkeeping and accounting procedures and the preparation and filing of income tax returns for the taxpayers for the calendar years beginning 1950 through the calendar year 1959. At the time the taxpayers employed the accountant they placed in his possession copies of their income tax returns for the years 1946, 1947, 1948 and, later, a photograph of the return for 1949, and other data. In some instances, the accountant would receive information and data as to income and expenditures directly from the taxpayers; in other instances, the accountant would collect this information from others, such as the information and data which he obtained from Norma Mantey, the bookkeeper at the Hinchcliff apartments. (TR-88, Jan. 3, 1963.) The accountant would assemble the information from cancelled checks, as well as from dividend income and deposit slips, and from that information he prepared the tax returns for the taxpayers. In referring to the work he performed, Mr. Graf identified himself as the auditor for Mrs. Hinchcliff and the Hinchcliff estate.

In March of 1961, James M. Clarke, an Internal Revenue agent, hereinafter referred to as the agent, began an examination of the 1957, 1958 and 1959 income tax returns filed by Alfred W. and Dorothy Hinchcliff to deter-

mine their correctness. (TR-46, Jan. 3, 1963.) The agent conversed with the accountant at various times in the months of March, April and the first half of May of 1961. In the course of these conversations, the agent informed the accountant that the examination involved the taxpayers' understatement of income from rental property, and the agent requested the accountant's permission to examine not only the accountant's records and data pertaining to the current open years but also his records for closed years prior to 1957. The accountant discussed this request with the taxpayers' attorney and was advised by the attorney to grant the request as to current open years but to refuse the request as to closed years.

On May 3, 1961, sixteen days prior to the issuance of the summons, the accountant permitted the agent to examine certain records in his possession, some of which were records owned by the taxpayers, particularly the income tax returns of the taxpayers for the years 1946, 1947, 1948, and 1949, and on the same date the accountant further permitted the agent to take such records and data to the Internal Revenue Office to have them photographed. (TR-45, Jan. 3, 1963.) The original documents and data photographed by the agent were returned to the accountant and the photographic copies have been identified and admitted as "Government's Exhibit No. 1 in Contempt Proceeding."

Thereafter, further conversations relative to documents and data of closed years occurred between the agent and the accountant and between the accountant and taxpayers' attorney. As a result of the objections of the taxpayers' attorney, the agent visited the office of the accountant on May 19, 1961, and on that occasion the agent and the accountant placed in boxes, which they then sealed, all of the records and data pertaining to the taxpayers

which were at that time in the possession of the accountant. The agent, on the same date, May 19, 1961, at 2:39 P.M., executed and served upon the accountant a summons requiring the accountant to appear before James M. Clarke (the agent) at 2:30 P.M. on May 19, 1961, at the accountant's office, to give testimony relating to the tax liability of Alfred W. and Dorothy Hinchcliff and to bring with him and to produce for examination "all books, records, work papers, and files pertaining to the above-named taxpayers. These records should include all net worth statements, financial statements, and profit and loss statements, certified or not." After the accountant and the agent had sealed in boxes all of the aforesaid pertinent documents, the accountant retained the sealed boxes in his possession.

On May 24, 1961, the agent and an Assistant United States Attorney appeared before United States Commissioner Herbert A. Horn and filed an application for an order of attachment against Donald J. Graf, under and by virtue of Sections 7602, 7603 and 7604 of Title 26 of the United States Code. This proceeding before the United States Commissioner was docketed as Case No. 4325 of Commissioner's Docket 12. On the same date, the accountant not being present but being represented by counsel, the Commissioner examined the agent who testified that the aforementioned summons was served on Mr. Graf on the 19th day of May, 1961, and that Mr. Graf had refused to turn over the documents for examination at the time the summons was served upon him. The Commissioner found that the Government was entitled to a writ of attachment; ordered that the documents sought be impounded; and that the accountant be restrained from dispossessing himself of said documents. The writ of attachment directed the accountant to appear before the Commissioner on June 2, 1961, at 2:00 P.M., to show cause

why he should not be found in contempt. This show cause hearing was postponed until June 13, 1961. On June 13, 1961, the accountant filed a motion to quash and vacate the order of attachment, the order to impound, and the writ of attachment, for the reason that the summons as served did not comply with Section 7605(a) of Title 26 of the United States Code in that it failed to give the accountant ten days in which to appear before the agent or to produce the documents summoned. This motion to quash was assigned for hearing on June 23, 1961, on which date the Commissioner overruled the motion. On June 23, 1961, a motion to quash and vacate the summons was filed on behalf of the taxpayers; however, the Commissioner refused to accept such motion for filing and the case was then passed to July 10, 1961. On July 10, 1961, the Commissioner vacated his order of June 23, 1961, wherein he overruled the motion to quash filed by the accountant, and the case was continued to July 31, 1961.

A few days prior to July 31, 1961, a dispute arose between the accountant and the taxpayers, which resulted in the accountant's informing the taxpayers that he was withdrawing and dismissing his motion to quash and declaring that he would comply with the summons by delivering to the agent the documents and data summonsed.

On July 31, 1961, and prior to the hour when the action was to proceed before the United States Commissioner, the taxpayers filed their complaint in the United States District Court (Civil No. 37102) seeking a temporary restraining order, a preliminary injunction, and a permanent injunction restraining the agent and the Director of Internal Revenue from further prosecuting the action pending before the United States Commissioner. A temporary restraining order was granted by the Court, and the proceeding before the United States Commissioner

was passed until August 11, 1961, and then to August 18, 1961. On August 18, 1961, this Court adjudged that the Commissioner should proceed in accord with the Court's memorandum reported in 205 F. Supp., 1. On August 28, 1961 the taxpayers filed a motion for leave to intervene in the case before the United States Commissioner, and the Commissioner passed the case to September 1, 1961. On September 1, 1961, the Commissioner, having found that the taxpayers did own some of the documents sought to be examined, allowed the taxpayers' motion to intervene; whereupon, the taxpayers filed a motion to quash the summons that was issued and served on the accountant, and the case again was passed by the Commissioner to September 6, 1961. On September 1, 1961, the accountant requested the withdrawal of his motion to quash the summons and to vacate the writ of attachment which he had filed on June 13, 1961. The Commissioner granted the accountant's request.

On September 7, 1961, an issue arose as to the ownership of the various documents which the Commissioner had ordered impounded, and the Commissioner continued the case to October 3, 1961, in order to permit the Commissioner to mark for identification each of these documents. Between September 7, 1961, and October 3, 1961, the Commissioner had stamped and numbered each impounded document, there being a total of 386 documents. On October 3, 5, and 9, 1961, the accountant was called as a witness and testified as to each identified document, stating where he had received it, from whom, and for what purpose he had used the document.

The testimony of the agent relating to his assignment to examine into the tax liability of the taxpayers for the years 1957, 1958 and 1959, and his testimony as to the documents, data and files which he was permitted to ex-

amine and copy, is bound separately and identified on the cover page as follows: "Testimony of James M. Clarke * * * taken at the trial of the above-entitled cause, before Commissioner Herbert A. Horn. Taken on September 6 and 7, 1961." The testimony of the accountant identifying the documents and data which he and the agent sealed in boxes after the agent had been permitted to examine them and to make copies of some of them is contained in a separate binding, upon the cover page of which is the following: "Testimony of Donald J. Graf, taken at the trial of the above-entitled cause, before Commissioner Herbert A. Horn. Taken on October 3, 5 and 9, 1961." There is not the slightest doubt that the testimony of the accountant and the agent clearly establishes that prior to the issuance of the summons the agent examined all and copied some of the documents and data which are the property of the taxpayers, and further clearly establishes that the summons sought the production of documents of the taxpayers, which documents clearly come within the limitations of Section 7605(a) and (b) of Title 26, U. S. C. A. From this testimony, and particularly from comments of Bert W. Griffin, the Assistant United States Attorney who conducted the examination, it is evident that the Government was laboring under the theory that if the evidence would disclose that the accountant in some manner used property of the taxpayers in preparing his work sheets and the tax returns, such use by the accountant made available to the Government, without a compliance with Section 7605(a) and (b) of Title 26, U. S. C. A., all property of the taxpayers which was so used. This theory apparently rests on the assumption that the taxpayers waived whatever rights they otherwise would be entitled to assert, when they allowed the accountant to take into his possession the documents in question. This theory the Court rejects.

The United States Commissioner and counsel for the parties herein devoted many hours of trial time in an endeavor to determine the ownership of each document that was impounded. However, following the taking of testimony on October 3, 5 and 9, 1961, the proceeding before the Commissioner became so involved in disputes between counsel and in arguments over procedure that on October 9, 1961, the case was continued until November 15, 1961. On November 15, 1961, counsel for the taxpayers caused a subpoena duces tecum to be issued and served on the agent, requiring him to appear and to bring with him all of the photographs of the documents and data which he had received from the accountant, together with any and all copies and memoranda prepared by the agent, or by the Internal Revenue Service, pertaining to the material which he had received from the accountant.

The agent appeared in response to the subpoena, but did not otherwise comply with the subpoena. At this point, the Commissioner expressed concern as to whether he had the power to cite the agent for contempt for failure to obey the subpoena. The Commissioner continued the case to the next day, at which time the taxpayers filed a motion for production, inspection and copying of documents of the type and nature described in the subpoena. The Commissioner again continued the matter to the following day, November 17, 1961. On November 17, 1961, the Commissioner overruled the motion of the taxpayers for production of documents and continued the case to November 20, 1961.

On November 20, 1961, under cross examination, the agent testified that he had received the subpoena (Intervenor's Exhibit B) but that he did not bring with him the documents subpoenaed. The agent admitted that he had photographed the tax returns of the taxpayers for the

years 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952 and 1953, and that he had taken and photographed one page of work sheet for each of the years 1951, 1952, 1953, 1954, 1955, 1956, 1957 and 1958, and that he had also photographed Internal Revenue Agent Reports for the years 1948, 1949, 1950, 1951, 1952 and 1953, which he had received from the accountant. By reason of the decision and judgment of the Court, which appear in the conclusions of law, no useful purpose will be served by a separate finding as to ownership of each exhibit.

Due to the rulings of the Commissioner on the taxpayers' motion for production of documents, and the failure of the Commissioner to rule upon the subpoena duces tecum, the taxpayers applied to this Court on November 20, 1961, in Civil Action No. 37102, for an order requiring the agent's obedience to the subpoena. A show cause order was directed to the agent on November 21, 1961, and an oral hearing upon the application was concluded on November 22, 1961. On November 27, 1961, this Court issued an order directing the agent to comply with the subpoena duces tecum on a date to be determined by the United States Commissioner. Fifteen days later the Government moved to vacate or amend the order of November 27, 1961, which motion was overruled for the reason that the same was not timely filed under the Federal Rules of Civil Procedure.

The Court will now digress to comment on one facet of the proceedings thus far. Mr. Griffin, the Assistant United States Attorney who, until his recent resignation, represented the Government in this cause, elected to apply to the United States Commissioner for enforcement of the summons under Section 7604(b), Title 26, U. S. C. A., instead of making his application to a Judge of the District Court. The events which transpired before the Commis-

sioner compel the Court to strongly recommend that in the future the United States Attorney make such applications to a United States District Judge.

On December 27, 1961, the United States Commissioner applied for permission to certify and transfer the proceedings to this Court. Upon consideration of said application and the briefs and arguments of counsel, the Court, on March 20, 1962, sustained the Commissioner's application and ordered that the proceedings before the United States Commissioner be certified and transferred to this Court and that the same be consolidated with Civil Action No. 37102. On May 1, 1962, the transcript and original record of the proceedings before the Unites States Commissioner were filed.

On January 3, 1963, this cause came on to be heard and was finally submitted at the conclusion of the testimony of James M. Clarke, the agent, Donald J. Graf, the accountant, Dorothy Hinchcliff, and Henry W. Rosewater. At that time the agent produced and gave testimony upon certain documents which were identified as "Government's Exhibit No. 1 in Contempt Proceeding." This exhibit contained the documents and data which the agent stated the accountant permitted him to take and photograph prior to May 19, 1961. From the evidence adduced in this Court, one significant fact was developed, that is, that prior to and including May 19, 1961, the agent pursued a course of action which he knew, or should have known, was partially if not wholly illegal, and that he did so with complete disregard of his duty to ascertain the propriety or legality of his actions. In support of this finding, the Court cites the testimony of the accountant and the agent as to their conversations during the period of time mentioned, and particularly that part of their conversations which had to do with the objections of the taxpayers' lawyer to an examination of records of closed years.

CONCLUSIONS OF LAW.

There are two classes of papers involved in this case. The first class is composed of those documents which record the business and tax affairs of the taxpayers for the years 1945 to 1956, which the taxpayers or their employees turned over to the accountant during that period. The second class is composed of the work papers and memoranda made by the accountant when he was preparing tax returns and doing accounting work for the taxpayers.

The agent's examination and photographing of the papers in the first classification, prior to May 19, 1961, as well as the agent's examination of such papers in the course of the proceedings before the United States Commissioner, was improper and illegal because the taxpayers had not been served with a reopening letter as is required by Section 7605(b) of Title 26, U. S. C. A. The Government's application for an order enforcing the summons issued to the accountant, which was filed before the United States Commissioner on May 24, 1961, is void and unenforceable because the summons did not meet the requirement of subsection (a) of Section 7605, Title 26, U. S. C. A. See *Hubner v. Tucker*, 245 F. 2d 35, 39 (9th Cir., 1957). As a result of this illegal examination and photographing of the taxpayers' papers, the Government became possessed of evidence to which it had no rightful claim. The Government's illegal action presents the question of whether the Court should order the suppression of the illegally obtained evidence. The Government's action here was taken by a trained agent who knew or must be charged with knowledge that he was acting in direct contravention of the statute. There was no need to instantly examine these records in order to preserve the evidence. The accountant had known for approximately two months that

the tax liability of the taxpayers was under investigation. Whatever offense or deficiency the taxpayers might ultimately have been proved to have perpetrated, society's interest in such proof certainly would have been less compelling than in cases involving the apprehension of dangerous or violent criminals—situations which are in fact involved in most cases where evidence is suppressed. The Court will order the suppression of all of the evidence which the Government obtained from this illegal examination and copying of the taxpayers' property. *Application of Leonardo*, 208 F. Supp. 124 (N. D. Calif., 1962); *Silverthorne Lumber Co. v. United States*, 251 U. S. 385 (1920).

This Court, being a court of equity as well as a court of law, has the power to fashion an appropriate order which will achieve the ends of justice. With this power in mind and upon the facts in this case, it appears appropriate that in establishing the scope of the suppression order the Government should be forever barred from using all evidence illegally obtained in any proceeding of any kind, and should be further barred from reacquiring it by any means. "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court, but that it shall not be used at all." *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 392, cited and approved in *Nardone, et al.* v. *United States*, 308 U. S. 338, 340 (1939). See the opinion of Mr. Justice Black in *United States* v. *Wallace & Tiernan Co.*, 336 U. S. 793 (1949), and the cases cited therein. See also *Homan Mfg. Co.* v. *Russo*, 233 F. 2d 547 (7th Cir., 1956).

The Court believes this broad order is appropriate because, in accord with the established facts, where the evidence will continue to exist, a suppression order which

merely required return of the illegally seized evidence, and allowed the Government to regain the same by later legal processes, would be a nearly futile gesture. It would create a precedent from which the Government might infer that if it acted illegally in future cases the greatest detriment it would suffer would be having to recommence its proceedings by a legal route, while if no objection were made the illegal action would stand and the Government would have lost nothing. The public policy condemning the invasion of personal rights is so strong that the Court can find no justification for any judgment or decision which would have the effect of establishing such a precedent.

The Government urges that its examination and copying of the papers in the second classification, that is, the work sheets and memoranda prepared by the accountant, were not illegal. In support of this contention the Government maintains that at all relevant times the accountant was working for the Hinchcliffs as an independent contractor, and that the papers which he compiled for his use in the course of his employment, as differentiated from the papers which were furnished him by the taxpayers and their agents, were the accountant's property and, being the accountant's property, the Government contends that the Internal Revenue Service was entitled to examine them without the benefit of a reopening letter or summons. As to the papers in the second classification, the Court will assume that this contention is correct, because the scope of the suppression order which the Court believes justice authorizes it to make creates a result no different than would be the case if these work sheets and memoranda were held to be the taxpayers' property.

If some of these papers did belong to the accountant,

as the Government contends, that legal situation would be nothing more than a later happy fortuity for the Government. A judicial determination, subsequent to the agent's examination, which held that some of the papers were the accountant's property should not be allowed to validate part of the agent's actions when his general purpose, as determined from his acts, was to embark, with complete disregard of the statute, upon an inspection which he is charged with knowing to have been at least partly and possibly entirely illegal, while making no attempt to determine what if any part of it was proper.

By the nature of the accountant's services, the information contained in the work sheets and memoranda, which the Government contends belonged to the accountant, was the same information that was contained in the papers that unquestionably were the taxpayers' property; in fact, the work sheets and memoranda were of necessity compiled from the records that belonged to the taxpayers. Thus, if the Government is permitted to use the information contained in these work sheets and memoranda, although it is barred from using the information obtained from the records that belonged to the taxpayer, it is in effect barred from nothing and there would be no effective sanction imposed against it in spite of its illegal taking of the taxpayers' property.

By the above statement the Court does not mean to imply that because a defendant has been the victim of an illegal search, seizure or examination he should be granted immunity from a conviction based on independent evidence. Such a holding would be clearly erroneous. *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385 (1920). This is not a case where evidence was illegally obtained and other evidence, separable from it, was legally obtained. Rather, this is a case highly analogous to one in which

"granting establishment of the primary illegality, the evidence to which the instant objection is made has been come at by the exploitation of that illegality * * * instead [of] by means sufficiently distinguishable to be purged of the primary taint." *Wong Sun and James Toy* v. *United States,* 31 U. S. Law Wk. 4079, 4084 (1963) U. S. S. C. This is because the papers which belonged to the taxpayers and the papers which the Government contends belonged to the accountant are so nearly identical in nature, and the procurement of the one group of papers was so closely intertwined with the procurement of the other group as to make them all the fruit of the illegal photographing and examination.

Under the circumstances of this case, and in view of the statutory and constitutional policies which seek to protect citizens from such governmental invasions of their rights as occurred here, it appears appropriate that this Court, in the exercise of its equity powers, should fashion a suppression order of a scope which includes the permanent suppression of all of the evidence belonging to this second classification insofar as it is similar to or extracted from the papers which unquestionably were the taxpayers' property. See *Nardone* v. *United States,* 308 U. S. 338 (1939), where the court was moved by similar considerations. See also *United States* v. *Coplin,* 185 F. 2d 629 (2nd Cir., 1950); *United States* v. *Paroutian,* 299 F. 2d 486 (2nd Cir., 1962); and *United States* v. *Lipshitz,* 132 F. Supp. 519 (E. D. N. Y., 1955).

The same reasons which compel the Court to permanently suppress, in this and in all future proceedings, the evidence obtained from the taxpayers' records, compels also the similar permanent suppression of all evidence obtained from the papers which it contends belonged to the accountant, insofar as that evidence is similar to the information illegally obtained from the taxpayers.

This suppression order shall not preclude, or in any way interfere with any investigation, examination or other action which the Government may institute as to the tax liability of the taxpayers, except that in any such investigation, examination or other action none of the evidence herein ordered suppressed may be used, employed, offered, introduced or relied upon.

This Court further concludes that the exhibits identified and introduced in this cause shall be separated by counsel in accord with the testimony of the accountant, and that those documents and exhibits which were turned over to the accountant by the taxpayers and their employees shall be returned to the taxpayers, together with the exhibits contained in "Government's Exhibit No. 1 in Contempt Proceeding," and that the remainder of the exhibits shall be returned to the accountant.

The foregoing is adopted as findings of fact and conclusions of law under Rule 52(a) of the Federal Rules of Civil Procedure.

GIRARD E. KALBFLEISCH,
United States District Judge.

MEMORANDUM OF DISTRICT COURT ON RECONSIDERATION OF INJUNCTION.

(Caption Omitted.)

(Filed May 13, 1964.)

Taxpayers, Dorothy and Alfred W. Hinchcliff, had entrusted their business records covering the years 1946 through 1959 to their accountant, Donald Graf. Mr. Graf had been engaged by the taxpayers as an employee for purposes which included the preparation of income tax returns for some of those years.

In March of 1961 James M. Clarke, an Internal Revenue agent, began an examination of the 1957, 1958 and 1959 income tax returns of Alfred W. and Dorothy Hinchcliff. At various times during March, April and May of 1961, Agent Clarke conversed with the accountant concerning the Hinchcliffs' tax returns. In the course of these conversations the agent informed the accountant that the examination involved the taxpayers' understatement of income, and the agent requested the accountant's permission to examine not only the records and data pertaining to the years 1957, 1958 and 1959, which previously had not been examined, but also to examine those for prior years, which had been subject to a former examination. The accountant, Graf, discussed this request with the taxpayers' attorney, and was ordered by the attorney to allow an inspection of the material for the years 1957, 1958 and 1959 but to refuse the requested authorization as to any prior years.

On May 3, 1961, Agent Clarke went to the accountant's office and there, in the presence of the accountant, proceeded to examine certain of the records, papers and documents pertaining to the Hinchcliffs' financial transactions. (Such records, papers and documents will hereafter be referred to simply as papers.) Some of the papers which the agent examined were owned by the accountant; others were owned by the taxpayers.

On that same date the agent removed many of those papers—including papers which were the property of the taxpayers pertaining to years before 1957—to the office of the Internal Revenue Service, and there examined and photographed them. At that time the agent was not armed with any summons or judicial or administrative process which authorized him to inspect or seize those papers. Sixteen days later the agent attempted to cure this defect by

serving upon the accountant a summons requiring him to appear to testify and to produce the papers. As this Court found in its findings of fact and conclusions of law, filed on August 1, 1963, "the agent pursued a course of action which he knew, or should have known, was partially if not wholly illegal, and * * * he did so with complete disregard of his duty to ascertain the propriety or legality of his actions." (P. 10.)

In the memorandum filed on August 1, 1963, the Court found that the agent's actions were in violation of the statutory requirements and that a proper sanction would be the permanent suppression of all of the papers and records for the years prior to 1957, as well as of the information contained therein or acquired therefrom, which the agent, Clarke, took from the office of the accountant on May 3, 1961.

Following the filing of the August 1 memorandum, the Government moved for reconsideration and proceeded to raise many issues which had not been contested previously. The Court disapproves of an attempt to retry a case upon a motion for reconsideration; however, because of the seriousness of the contentions which have been raised for the first time, the Court feels obliged to entertain extensively certain additional questions.

Upon reconsideration, the Court finds, in addition to the findings of fact and conclusions of law which were filed on August 1, 1963, that the inspection, removal and copying of the taxpayers' papers which related to years prior to 1957 was an unconstitutional search and seizure of the taxpayers' property in violation of the Fourth Amendment of the United States Constitution.

The Fourth Amendment provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unrea-

sonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

It is not without reason that the prohibition against unreasonable searches and seizures was incorporated in the first ten amendments to the Constitution. The development of the body of law concerned with such searches and seizures can be traced back for centuries into the common and criminal law. For a resume of this development see Mr. Justice Bradley's classic opinion in *Boyd v. United States*, 116 U. S. 616, 6 S. Ct. 524, 29 L. Ed. 746 (1886), in which he quoted with approval portions of Lord Camden's opinion in *Entick v. Carrington and Three Other King's Messengers*, reported in 19 Howell's State Trials 1029 (1765). Lord Camden, in turn, commented upon developments of the concept at the time of Lord Coke, which are reported in Coke's 4 Institutes 176.

The Fourth Amendment is the embodiment of those protections which, as Mr. Justice Bradley said:

> "* * * affect the very essence of constitutional liberty and security. * * * they apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property, * * *. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony, or of his private papers to be used as evidence to convict him of crime, or to forfeit his goods, is within the condemnation of that judgment." *Boyd v. United States*, 116 U. S. 616, 630, 6 S. Ct. 524, 532, 29 L. Ed. 746 (1886).

The United States Supreme Court, nearly thirty years later, gave further implementation to the sanctity of the Fourth Amendment in *Weeks v. United States,* 232 U. S. 383, 34 S. Ct. 341, 58 L. Ed. 652 (1914). And again in *Mapp v. Ohio,* 367 U. S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961), the Court reiterated the proposition that the security of one's privacy against arbitrary intrusion by the police is implicit in the concept of ordered liberty.

It is thus apparent that the rights secured to citizens by the Fourth Amendment are not limited to those which obviously flow from a narrow construction of the literal wording of that enactment, but include the rights of citizens to be free in their persons, papers, homes and offices from unwarranted and unreasonable intrusion by Government officials. The Fourth Amendment is, in short, the guarantee of a right to privacy. *United States v. Jeffers,* 342 U. S. 48, 72 S. Ct. 93, 96 L. Ed. 59 (1951); *Jones v. United States,* 362 U. S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960).

A study of the cases reveals that in recent years the protection of the Fourth Amendment has most often been applied in instances where the property seized was either contraband or articles used in the commission of crimes. Rare has been the case—as our society has developed, and as the long arm of the Government has reached into the private affairs of life through the various regulatory agencies—when the right to privacy of papers has been asserted under the Fourth Amendment. Clearly that right today, in our industrial, closely regulated society, is not so great as it was in England when Lord Camden could say that the search for papers was, with one exception, unknown to that part of the criminal law which did not emanate from the Star Chamber. Yet even today we would do well to remember that our rights stem from a

time when it was the belief, as Lord Camden said some twenty-five years before the drafting of our Constitution, that:

> "Papers are the owner's goods and chattels; they are his dearest property; and are so far from enduring a seizure; that they will hardly bear an inspection; and though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away the secret nature of those goods will be an aggravation of the trespass and demand more considerable damages in that respect." (*Entick v. Carrington and Three Other King's Messengers, supra.*)

It is apparent that if there is a hierarchy of sanctity according to which certain types of searches and seizures are more pernicious than others, the unreasonable search and seizure of a man's books and papers belongs in that category of wrongs most strongly condemned.

Turning now to the facts of this case, because the Fourth Amendment speaks in terms of criminal prosecutions and of warrants issued upon probable cause, the question immediately arises whether it applies to protect papers of a taxpayer, which pertain to his civil tax liability, from a search and seizure by a government which is attempting to determine that liability. The answer must be that it does.

The Court will assume, for present purposes, that the investigation undertaken by Agent Clarke was not conducted with a view toward criminal action against the taxpayers but was undertaken only for the purpose of determining their civil tax liability. Although the Fourth Amendment speaks in terms of criminal prosecutions only, where the Government is seeking to take private property in a civil tax action the shield of the Amendment's protection is no less available to the citizen than it would

be in a criminal prosecution arising from the same facts. Any doubts as to this proposition were set at rest by *Boyd v. United States*, 116 U. S. 616, 6 S. Ct. 524, 29 L. Ed. 746 (1886).

In *Boyd* the Government sought a forfeiture of property because of failure to pay taxes thereon. The action was instituted under a statute which required the taxpayer to produce certain books and papers which would pertain to his tax liability, and further provided that if he did not produce them allegations which the Government made concerning their contents should be taken as confessed. The Supreme Court declared that statute unconstitutional as being violative of the Fourth Amendment. It held that it was tantamount to compelling the production of such papers, and that such production, when sought for the purpose of taking property under the tax statutes, "is within the scope of the fourth amendment to the constitution * * *." (116 U. S. p. 622, 6 S. Ct. p. 528.)

> "Reverting then to the peculiar phraseology of this act, and to the information in the present case, which is founded on it, we have to deal with an act which expressly excludes criminal proceedings from its operation (though embracing civil suits for penalties and forfeitures), and with an information not technically a criminal proceeding, and neither, therefore, within the literal terms of the fifth amendment to the constitution any more than it is within the literal terms of the fourth. Does this relieve the proceedings or the law from being obnoxious to the prohibitions of either? We think not; we think they are within the spirit of both." (116 U. S. p. 633, 6 S. Ct. p. 534.)

The forfeiture sought in the *Boyd* case was a civil action highly analogous to a modern civil tax action which

seeks to recover a deficiency assessment and possible fraud penalties. The Government admits that it seeks to institute such an action against Mrs. Hinchcliff.

The Court is not holding that in instances involving civil investigations a taxpayer's records may be examined only upon issuance of a warrant based upon probable cause. That part of the terminology of the Fourth Amendment which speaks of warrants is peculiarly applicable to criminal investigations but, in view of *Boyd*, the principle which the Fourth Amendment represents—the principle of the right to privacy and freedom from unwarranted governmental interference—is equally applicable in civil cases where property loss to the citizen is the object of the Government's efforts.

The question remains whether these documents and papers which were taken by Agent Clarke were taken in such a manner as to constitute an unreasonable search and seizure. The Court believes that they were.

It cannot be doubted that the taxpayer has standing to assert her constitutional privileges when the papers were seized not from her possession but from the possession of a bailee who was her employee. In many cases the Supreme Court has held that ownership of property confers upon the owner sufficient standing to object to its search and seizure. See, for instance, *United States v. Jeffers*, 342 U. S. 48, 72 S. Ct. 93, 96 L. Ed. 59 (1951), and the comments in *Jones v. United States*, 362 U. S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960). Cf. *Johnson v. United States*, 228 U. S. 457, 33 S. Ct. 572, 57 L. Ed. 919 (1913); and *Dier v. Banton*, 262 U. S. 147, 43 S. Ct. 533, 67 L. Ed. 915 (1923).

It cannot be doubted today that not only does an owner of property have standing to complain of the seizure of that property, but also that when books and papers

which contain information which may lead to discovery of a crime—as distinguished from articles which are either instrumentalities of crime or contraband—are in the hands of an authorized bailee, the constitutional rights of the owner of those books and papers have been violated unless the Government proceeds under process of law before acquiring those papers, or unless the bailee has either actual or apparent authority to give them to the Government. See *United States v. Hopps,* 215 F. Supp. 734 (D. Md., 1962), and *Lord v. Kelley,* D. C., 223 F. Supp. 684 (1963), in which latter case the District Court in Massachusetts was faced with facts nearly identical with those in the present controversy.

The Fourth Circuit discussed a property owner's right to object to a search of bailed property in *United States v. Eldridge,* 302 F. 2d 463 (1962). In that case the defendant, who owned an automobile, had loaned it to a friend, who authorized police to search the car. In the course of the search the officers discovered stolen property. The Court decided that the owner had given the bailee authority to authorize the search, and based its decision upon that point. However, implicit in the opinion is the premise that had such permission not been granted the owner would have been entitled to require legal process before the search would have been permissible, in spite of the fact that the bailee had authorized the search. The dissent appears to have concurred in that assumption, and the dissenting opinion is based upon the premise that the owner had not authorized the bailee to permit the search. Furthermore, the Supreme Court tacitly recognized such a right of the owner of books and records in *Reisman v. Caplin,* 84 S. Ct. 508 (1964), when it held that a taxpayer, whose property was in the hands of a bailee who was proposing to give that property to tax authorities, could

restrain that action and by intervention assert his claim as owner of the property. While the *Reisman* opinion is concerned with statutory procedures, the Court is of the opinion that it also tacitly recognizes the property owner's constitutional rights.

The question then remains whether the bailee-accountant was authorized to allow the Internal Revenue Agent to view, remove and copy the pre-1957 documents.

This Court finds that not only was the accountant not authorized to turn over these documents to the Government agents, but that he was specifically instructed that he should not turn them over. Thus, he had no authority in fact to give them to the Government.

The Court finds that the accountant, Graf, did not have any authority implied in law to allow the Government to take these papers. This is not a case where two people have equal rights in property or are co-tenants thereof. In such cases the courts have held that either party can consent to the search of the property, and any evidence resulting from that search can be used against either. See, for instance, *Driskill v. United States*, 281 F. 146 (9th Cir., 1922).

The Court has found no cases which hold that implied-in-law permission is given to a bailee to authorize search of the bailed property. Even the Fourth Circuit, which in *United States v. Eldridge*, 302 F. 2d 463 (1962), held that a bailee had permission to authorize search of an automobile, seems to have based that decision upon the premise that the authority was implied in fact from the nature of the bailed article and the bailee's dominion thereover, rather than upon any theories of authority implied in law which are inherent in the bailor-bailee relationship.

Nor did the accountant, Graf, have any apparent authority to allow the Internal Revenue agent to seize and

inspect the books and documents in question. The Government agent's authorization to be on the premises did not authorize him to search and seize the books and records of the taxpayer. See *United States v. Hopps*, 215 F. Supp. 734 (D. Md., 1962); and *United States v. Guerrina*, 112 F. Supp. 126 (E. D. Pa., 1953).

In *Lord v. Kelley*, 223 F. Supp. 684 (D. Mass., 1963), the Court held that an accountant does not have apparent authority to deliver a taxpayer's books and records to the Internal Revenue Service. The Court concurs in that conclusion. While under some circumstances a bailee may have apparent authority to allow a search or seizure of the bailed articles (see *United States v. Eldridge, supra*), those circumstances were not present in this case. It was obvious, or should have been obvious, that the accountant was retaining these papers for the purpose of providing himself with a continuous record of the taxpapers' business transactions. His dominion over the documents was as an agent or employee of the taxpayers, for the benefit of the taxpayers, and was not for his own use or benefit as an individual. As such, he did not have that dominion over the articles in question which would have implied his authority to grant a search or seizure thereof.

There are several analogous situations. In *United States v. Guerrina*, 112 F. Supp. 126 (1953), the District Court in Pennsylvania held that a secretary did not have implied-in-fact permission to authorize Internal Revenue agents to search the files of her employer although she had exclusive control over the office in the employer's absence, during which time the agents made their visit. In *United States v. Lagow*, 66 F. Supp. 738 (S. D. N. Y., 1946), affirmed at 159 F. 2d 245 (1946), Judge Holtzoff held that an employee who was not an officer of the corporation was

not authorized to turn over corporate documents and records to agents of the Office of Price Administration. See also *Lustig v. United States,* 338 U. S. 74, 69 S. Ct. 1372, 93 L. Ed. 1819 (1949); and *Stoner v. California,* 84 St. Ct. 889 (1964).

If the Court were to hold that the accountant had either implied-in-law or apparent authority to deliver these papers to the Internal Revenue agent, such a holding would be an extension of the law of implied or apparent authority in contradiction to the holdings of the above-cited cases. The Supreme Court prohibited such an extension when it said, in *Stoner v. California,* 84 S. Ct. 889 (1964):

> "Our decisions make clear that the rights protected by the Fourth Amendment are not to be eroded by strained applications of the law of agency or by unrealistic doctrines of 'apparent authority.' "

The Court then repeated its earlier statement in *Jones v. United States,* 362 U. S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960), that:

> "* * * it is unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical." (362 U. S. p. 266, 80 S. Ct. p. 733.)

And in *United States v. Jeffers,* 342 U. S. 48 (1951), the Court refused to permit what it termed a "quibbling distinction," involving property rights, to override constitutional rights.

It must be emphasized that the determination made herein is that when an owner of property, which has not

been used in the commission of a crime and which is not contraband, has bailed that property, and has not given the bailee either actual or apparent authority to consent to a search or seizure of that property, the property cannot be searched or seized without legal process.

The distinction between property which is legally possessed and has not been used as an instrumentality in the commission of a crime, and property which has been used as an instrumentality in committing a criminal act, or which is illegally possessed, cannot be over-emphasized. This is a distinction which Mr. Justice Bradley deemed important in *Boyd v. United States, supra,* and which he traced back into the developmental stage of the English law. It is a distinction made by the court in *United States v. Hopps,* 215 F. Supp. 734 (D. Md., 1962), and which Mr. Justice Frankfurter insisted upon in his dissent in *Zap v. United States,* 328 U. S. 624, 66 S. Ct. 1277, 90 L. Ed. 1477 (1946). There the Justice said:

> "If, in the course of a valid search, materials are uncovered, the very possession or concealment of which is a crime, they may be seized. But to seize for evidentiary use papers the possession of which involves no infringement of law, is a horse of a different color." (328 U. S. p. 632, 66 S. Ct. p. 1281.)

It should be mentioned that in this case we are not dealing with books and records which are required by law to be kept. Such books and records, it has been held are not protected by the Fourth Amendment. *Rodgers v. United States,* 138 F. 2d 992 (6th Cir., 1943); and *Bowles v. Misle,* 64 F. Supp. 835 (D. Neb., 1946). Nor is this a case where a taxpayer has waived his constitutional rights by entering into a contract or agreement with the Government. *Zap v. United States,* 328 U. S. 624, 66 St. Ct. 1277, 90 L. Ed. 1477 (1946).

The Court therefore concludes that taxpayers were subjected to an unconstitutional search and seizure of their property by the Internal Revenue agent, and that they have standing to object to that search and seizure.

The contention also has been made that the plaintiff seeks an injunction against Internal Revenue officers and that the Court does not have authority to issue such an injunction in a case of this nature. The Government contends that the Court's authority to supervise the United States Attorney does not extend so far as to give it power to control employees of various federal agencies. Whatever merit there may have been to that argument at one time, in view of *Rea v. United States*, 350 U. S. 214, 76 S. Ct. 292, 100 L. Ed. 233 (1956), it is no longer tenable. In *Rea* the Supreme Court held that a district court did have the power to forbid a federal narcotics agent from testifying in a state court. The Court said that the question raised was one:

> "* * * concerning our supervisory powers over federal law enforcement agencies, * * *
>
> "A federal agent has violated the federal Rules governing searches and seizures—Rules prescribed by this Court and made effective after submission to the Congress. * * * The power of the federal courts extends to policing those requirements and making certain that they are observed."

It further said:

> "* * * To enjoin the federal agent from testifying is merely to enforce the federal Rules against those owing obedience to them."

Mr. Justice Harlan's dissent was based upon his belief that at no time had the Court previously held that its supervisory powers extended over federal executive

officers. Neither *Wilson v. Schnettler*, 365 U. S. 381, 81 S. Ct. 632, 5 L. Ed. 2d 620 (1961), nor *Cleary v. Bolger*, 371 U. S. 392, 83 S. Ct. 385, 9 L. Ed. 2d 390 (1963), detracts from the holding of *Rea*. To the extent that *Eastus v. Bradshaw*, 94 F. 2d 788 (5th Cir., 1938), is a contradiction to *Rea*, it is no longer the law.

The next question concerns the Court's jurisdiction to entertain the motion at this time.

The Court is not convinced that this case does not involve a pre-indictment motion to suppress unconstitutionally seized evidence. One of the taxpayers involved is still alive and subject to criminal punishment. Rule 41(e), of the Federal Rules of Criminal Procedure, provides for pre-trial suppression of evidence in most instances where evidence has been seized in violation of the Fourth Amendment. And no longer can there be any doubt that such motions may be made before indictment. *Lord v. Kelley*, 223 F. Supp. 684 (D. Mass., 1963). Although the Supreme Court in *DiBella v. United States*, 369 U. S. 121, 82 S. Ct. 654, 7 L. Ed. 2d 614 (1962), did not specifically hold that pre-indictment suppression motions were proper, it did hold that such motions were generally non-appealable. It is difficult to imagine that that Court would have ruled upon the appealability of such motions if it did not believe that the trial court had jurisdiction to entertain them originally.

Thus, in spite of language in some cases, such as *Eastus v. Bradshaw*, 94 F. 2d 788 (5th Cir., 1938), which the Government here seeks to extend, it is clear that today federal courts will suppress evidence which has been obtained in violation of the Fourth and Fifth Amendments and that, at least where the rights violated are ones guaranteed by the Fourth Amendment, the suppression motion may be made prior to indictment.

The reason for the requirement of Rule 41(e) that such suppression motions must be made prior to trial, if the defendant has the knowledge on which to base the motion, is that good procedure requires that the questions of evidence be tried separately and apart from the trial of the criminal suit. The rule is designed to expedite orderly trial procedure and to avoid unnecessary delay. See the opinion of the United States Supreme Court in *Jones v. United States*, 362 U. S. 257, 264, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960). Likewise, the reason for allowing entertainment of the motion prior to indictment was succinctly stated by Judge Jerome Frank in *In re Fried*, 161 F. 2d 453 (2nd Cir., 1947):

> "The government further argues that an indictment founded upon such illicit evidence will do the applicant no harm, since such evidence will not be admitted at the trial which follows the indictment. That is an astonishingly callous argument which ignores the obvious. For a wrongful indictment is no laughing matter; often it works a grievous, irreparable injury to the person indicted. The stigma cannot be easily erased. * * * Prosecutors have an immense discretion in instituting criminal proceedings which may lastingly besmirch reputations. That discretion is almost completely unfettered. It should surely not extend so far as to preclude judicial interference with a prosecutor's aim to induce an indictment by offering to a grand jury evidence which is the product of illegal acts of federal officers."

In the *Fried* case the Second Circuit held that Rule 41(e) was also applicable when the injury complained of was a coerced confession allegedly in violation of the Fifth Amendment. Justice Learned Hand concurred, and Justice Augustus Hand dissented. The determination that Rule 41(e) was also applicable to Fifth Amendment rights

was questioned by the Sixth Circuit in *Biggs v. United States*, 246 F. 2d 40 (1957), which relied upon *Benes v. Canary*, 224 F. 2d 470 (6th Cir., 1955), where the Sixth Circuit held that Rule 41(e) was limited to cases involving violations of the Fourth Amendment.

The question of the scope of a Rule 41 (e) proceeding is important here, because the action complained of does not fall within any of the specific provisions of Rule 41(e) although it does come within the protection of the Fourth Amendment. The Court does not believe that its jurisdiction to entertain pre-indictment suppression proceedings, seeking the return of property and the suppression of evidence, is limited to those cases which are specifically enumerated in Rule 41(e); but believes, in accordance with *Biggs v. United States, supra,* and *Benes v. Canary, supra,* that that jurisdiction encompasses all instances in which the evidence was obtained in violation of the Fourth Amendment. Furthermore, the United States Supreme Court has held in *Jones v. United States*, 362 U. S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960), that the exact words of Rule 41(e) are not controlling, but, rather, that the important consideration is the general policy behind the rule.

However, even if no criminal prosecution is contemplated, the Court has jurisdiction to entertain this motion. If, as the Court has found, its jurisdiction to entertain pre-trial motions seeking the suppression and return of property seized in violation of the Fourth Amendment is as broad as that amendment, it necessarily follows, in view of *Boyd v. United States, supra,* that it has jurisdiction to order the suppression and return of property before the institution of the civil tax proceeding.

This is not an action to enjoin assessment and collection of a tax. (See *Vuin v. Burton*, 327 F. 2d 967 (6th

Cir., 1964); and *De Masters v. Arend*, 313 F. 2d 79 (9th Cir., 1963). It is an action seeking the suppression and return of property. The issue of the collection of the revenues is involved only to the extent that the Government has sought to proceed with that collection by unconstitutional means. No order here will prohibit a tax assessment or collection; it will only prohibit the very imminent prospect of the use of unconstitutionally seized property in making that assessment.

This Court therefore concludes that it has jurisdiction to entertain this motion to suppress and return the evidence obtained in violation of the Fourth Amendment, although the actions complained of do not literally come within the terminology of Rule 41(e).

The question then arises as to the appropriate remedy. In its original opinion the Court required the permanent suppression of all of the evidence which the Government had obtained from its examination and copying of the taxpayers' property for the years prior to 1957, and further required the return of that property to the taxpayers. In view of the present determination that the search and seizure was in violation of the Fourth Amendment of the United States Constitution, that determination was correct.

The exclusionary rule of evidence which seeks to protect citizens from unconstitutional searches and seizures was first enunciated in *Weeks v. United States*, 232 U. S. 383, 34 S. Ct. 341, 58 L. Ed. 652 (1914):

> "The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction

in the judgments of the courts, which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights." (232 U. S. P. 392, 34 S. Ct. p. 344.)

"If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land." (232 U. S. P. 393, 34 S. Ct. p. 344.)

"* * * this court said that the Fourth Amendment was intended to secure the citizen in person and property against unlawful invasion of the sanctity of his home by officers of the law acting under legislative or judicial sanction. This protection is equally extended to the action of the government and officers of the law acting under it. * * * To sanction such proceedings would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action." (232 U. S. P. 394, 34 S. Ct. p. 345.)

In *Wolf v. Colorado,* 338 U. S. 25, 69 S. Ct. 1359, 93 L. Ed. 1782 (1949), the court held that the Fourth Amendment was applicable to the states. In *Mapp v. Ohio,* 367 U. S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961), the court held that the exclusionary rule of *Weeks v. United States* likewise was applicable to the states. Throughout these opinions the Supreme Court has made it clear

beyond doubt that the Fourth Amendment is basically a right to privacy, and in *Mapp v. Ohio, supra,* it held that where that right to privacy exists the suppression of unconstitutionally seized evidence was "an essential part of the right to privacy." A Michigan district court, in *United States v. Young,* 215 F. Supp. 202 (E. D. Mich., 1963), in ordering return of certain receipt books which had been obtained from the taxpayer by a Government agent, said:

> "The Government should not be allowed to make illegal searches and then use the information it thereby discovers as a wedge for prying incriminating evidence out of the citizenry. Such a result would succeed in making a sham of the Fourth Amendment and not be in keeping with the mandate of the Supreme Court and the Court of Appeals for the Sixth Circuit that the Fourth Amendment should be liberally construed. See Catalanotte v. United States (C. A. 6, 1953), 208 F. 2d 264, * * *."

And a district court in Pennsylvania, in *United States v. Guerrina,* 112 F. Supp. 126 (E. D. Pa., 1953), in ordering suppression of certain evidence obtained from the defendant's books and records which the Internal Revenue Service was seeking to use against him, said:

> "Where Federal officers violate the Constitution in obtaining evidence 'the federal courts refuse to hear it, esteeming the upholding of the constitutional guaranties against abuse of govemnmental power more important in such circumstances than the discovery of the truth.' * * * And '* * * the forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment.' "

The original determination of this Court required the suppression, for purposes of both criminal and civil tax proceedings, of the evidence unconstitionally obtained and of the other evidence simultaneously obtained during the execution of the plan to effectuate an unconstitutional search and seizure. The Government has strongly contended that it is improper to order the suppression of the evidence for civil purposes, and has claimed that the suppression theory is applied only in criminal cases.

It is certainly true that the suppression theory is usually applied in criminal cases, but this is because most cases which involve an unconstitutional search and seizure are criminal prosecutions. The Government has been able to present the Court with no rationale which would support a determination that suppression is proper where the unconstitutional search and seizure would lead to criminal jeopardy, while at the same time holding that suppression would not be proper when the unconstitutional search and seizure would lead to a civil tax liability. Rather, there are most satisfactory reasons for refusing to make such a distinction.

In *Mapp v. Ohio*, 367 U. S. 643, 81 S. Ct. 1684, 6 L. Ed. 1081 (1961), the Supreme Court stated the basis for the exclusionary doctrine. It is clear that the basis does not depend upon the trustworthiness of the evidence obtained; rather, it depends upon the sanctity of the right to privacy and the proposition that to preserve that sanctity the Government must not be allowed to benefit by its own wrongs. The Court referred to "the imperative of judicial integrity," (367 U. S. P. 659, 81 S. Ct. p. 1694), and went on to say:

> "The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own

laws, or worse, its disregard of the character of its own existence."

The Court then quoted with approval Mr. Justice Brandeis's dissent in *Olmstead v. United States*, 277 U. S. 438, 485, 48 S. Ct. 564, 575, 72 L. Ed. 944 (1928):

> "Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. * * * If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."

Neither judicial integrity nor governmental example would be enhanced by allowing the use of unconstitutionally seized evidence in a civil tax proceeding. The factors which militate against the use of such evidence are as strong in such a proceeding as they are in any criminal case while, in fact, the factors mitigating against the suppression of such evidence are far less satisfactory. Here there is no instance of turning hardened and dangerous criminals loose upon society; here there is no instance of allowing heinous and immoral crimes to go unpunished; here there is but the potentiality of some slight decrease in the governmental revenues. If any distinction were to be drawn between civil tax proceedings and criminal proceedings in regard to the exclusionary rule of evidence, it would be far more appropriate, from the viewpoint of protecting society, that evidence be excluded in civil tax cases than that it be excluded in criminal cases. But the Court is convinced that as our law has developed no distinction is tenable. In view of *Mapp v. Ohio, supra*, it is apparent that all unconstitutionally seized evidence must be suppressed. Speaking of the right to privacy under the Fourth Amendment the court there said that suppres-

sion was "an essential ingredient of the right. * * *" If suppression is a part of the right, it is as much a part in a civil proceeding as it is in a criminal one.

Furthermore, the denial to the Government of opportunities to collect taxes is not an unknown sanction when the Government has overstepped the bounds of its authority. In *Reineman v. United States,* 301 F. 2d 267 (7th Cir., 1962), the trial Court had enjoined the collection of a deficiency assessment, not upon the basis that the taxpayers' constitutional rights against search and seizure had been violated, but because the Government had ignored taxpayers' rights to a reopening letter before it re-examined their books. Because the taxpayers were left without a remedy to correct the Commissioner's illegal action unless the deficiency assessment, which was based upon the illegally discovered facts, was set aside, the Appellate Court affirmed the injunction.

The remaining question concerns the scope of the suppression order. In *Lord v. Kelley,* 223 F. Supp. 684 (D. Mass., 1963), the Court was faced with a problem substantially the same as the one herein. The Court there ordered the return of the records to the taxpayers, but permitted the Government to reacquire them later by appropriate process. It held that such a remedy was appropriate because the object of suppression was to place the taxpayers in as good a position as they would have been in had the unconstitutional search and seizure not occurred, but that it would be inappropriate to place them in a better position. The short answer to this proposition is that the desired result is impossible to attain. Because of the Government's unconstitutional actions, the taxpayers have been put to great expense in an attempt to protect their rights. Meanwhile, the very insistence on those rights may cause the Government to seek to see the

documents involved, upon the theory that no person objects to the production of innocent evidence. By the very nature of such a situation the Government would be seeking to benefit by its own wrongs. Such benefit is the very thing which the exclusionary rule seeks to prevent. *Mapp v. Ohio, supra.* Furthermore, to allow those books and records to be reacquired would be to give but a hollow victory to the vindication of constitutional rights.

However, there were equitable considerations in the Massachusetts case which inclined that Court toward the more lenient remedy awarded there. Those considerations do not exist in this case. The opinion in *Lord v. Kelley, supra,* states that the Internal Revenue agent acknowledged his error in open court, and it was the opinion of the Court that it was unlikely that Internal Revenue agents would soon again, if ever, participate in such unconstitutional action.

In this case the Government has shown no contrition over its errors, but throughout this proceeding has discounted them as mere technical deviations from hampering statutory requirements. However, the Court has determined that the actions taken were not only violations of the statutes, which indeed they were, but that they were unconstitutional deprivations of the rights guaranteed to every citizen by the Fourth Amendment. The language of the dissent in *Zap v. United States,* 328 U. S. 624, 633, 66 S. Ct. 1277, 1281, 90 L. Ed. 1477 (1946), is particularly appropriate:

> "The Government deems this a 'technical error.' It is a 'technicality' of such substance that this Court has frequently announced the duty to suppress evidence * * *. The fact that this evidence might have been secured by a lawful warrant seems a strange basis for approving seizure without a warrant. The Fourth Amendment stands in the way."

Upon reconsideration, the original determination will not be modified.

s/ GIRARD E. KALBFLEISCH,
United States District Judge.

FINAL ORDER OF THE DISTRICT COURT.

(Entered March 2, 1965.)

KALBFLEISCH, J.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

CIVIL ACTION NO. 37102

DOROTHY HINCHCLIFF, individually and as Executrix of the Estate of ALFRED W. HINCHCLIFF, *deceased*, PLAINTIFF,

v.

JAMES M. CLARKE, Internal Revenue Agent, and MELVIN J. BURTON, District Director of Internal Revenue, DEFENDANTS.

COMMISSIONER'S DOCKET NO. 12, NO. 4325
UNITED STATES OF AMERICA, PLAINTIFF,

v.

DONALD J. GRAF, DEFENDANT

ORDER.

The Court having filed its opinion of August 1, 1963, and May 13, 1964,

IT IS ORDERED, ADJUDGED AND DECREED THAT:

The application of the United States of America for an order to enforce the summons served by the defendant James M. Clarke upon Donald J. Graf on May 19, 1961, is denied.

The motion of the United States of America and the defendants James M. Clarke and Melvin J. Burton for an order requiring the production of the documents set forth in the said summons served upon Donald J. Graf on May 19, 1961, and the supplemental summons served upon Dorothy Hinchcliff on November 8, 1962, individually and in her representative capacity, is overruled.

The writ of attachment issued by the United States Commissioner on May 24, 1961, and the order of the Commissioner restraining the defendant Donald J. Graf from dispossessing himself of certain documents and impounding the same are hereby vacated and dissolved.

The motions of Dorothy Hinchcliff, individually and in her representative capacity (a) to quash and vacate the summons served upon Donald J. Graf on May 19, 1961, and (b) to vacate the summons served upon her on November 8, 1962, by James M. Clarke are hereby granted.

The complaint of Dorothy Hinchcliff, individually and in her representative capacity, for an order restraining the defendants James M. Clarke and Melvin J. Burton from proceeding with the investigation of the income tax liabilities of Dorothy Hinchcliff and her decedent is denied.

Upon the motion of the defendants to reconsider the Court's opinion filed August 1, 1963, said motion is denied in accord with the Court's memorandum of May 1, 1964.

The income tax returns, documents, memoranda and papers, and the contents thereof, turned over to Donald J. Graf by the intervenor Dorothy Hinchcliff, and/or the decedent, Alfred W. Hinchcliff, and/or their employees, representatives, and agents, for the years 1945 to 1956, inclusive, which were obtained by the defendants, are hereby suppressed as evidence; and all evidence which the United States of America obtained from, through,

or as a result of the illegal examination, possession and/or copying of the said income tax returns, documents, papers and memoranda is hereby suppressed.

The United States of America, its departments, agencies, officers, employees and/or representatives are hereby forever enjoined from using any and all such evidence in any trial or proceeding of any kind, and are forever barred from reacquiring any and all such evidence by any means.

The contents of all of the workpapers, worksheets, memoranda, income tax returns, and/or other documents and papers for the years 1945 to 1956, inclusive, made or prepared by Donald J. Graf, and/or any other person under his direction, relative to the business and/or tax affairs of the intervenor, Dorothy Hinchcliff, and/or of the decedent, Alfred W. Hinchcliff, which were obtained by the defendants from Donald J. Graf, are hereby suppressed as evidence; and all evidence obtained by the United States of America from, through, or as a result of the illegal copying, photographing and/or examining of the said workpapers, worksheets, memoranda, income tax returns, and/or other documents and papers prepared by Donald J. Graf, and/or any other person under his direction, is hereby suppressed.

The United States of America, its departments, agencies, officers, employees, and/or representatives are hereby forever barred from using any and all such evidence in any proceeding of any kind, and are forever barred from reacquiring any and all such evidence by any means.

None of the evidence herein ordered suppressed may be used, employed, offered, introduced or relied upon by the United States of America in any investigation, examination or other action or proceeding which the United States of America, its departments, agencies, offi-

cers and/or representatives may institute relating in any way to the tax liability of the intervenor, Dorothy Hinchcliff, and/or the estate of Alfred W. Hinchcliff, deceased.

Counsel shall separate, in accordance with the testimony of Donald J. Graf, the various and respective exhibits identified before the United States Commissioner and introduced in this case; these documents, memoranda, income tax returns, worksheets, work papers and/or other papers which were turned over to Donald J. Graf by Alfred W. Hinchcliff and/or Dorothy Hinchcliff and/or the employees, representatives and/or agents of either or both shall be returned to Dorothy Hinchcliff, individually and/or in her representative capacity, and the remaining documents shall be returned to Donald J. Graf.

All reproductions, mechanical or handwritten, photographs and/or resumes of the income tax returns, documents, workpapers, worksheets, memoranda and/or papers, including but not limited to all exhibits contained in Government's Exhibit 1 in Contempt Proceeding, which were obtained as a result of the illegal examination and copying and photographing of the documents by James M. Clarke, shall be returned to Dorothy Hinchcliff, individually and/or in her representative capacity.

All documents, records, memoranda and/or statements contained in Court's Exhibit "A" in Contempt Proceeding, including but not limited to the statements of assets and liabilities of Alfred W. Hinchcliff and/or Dorothy Hinchcliff for the taxable years 1944 to 1956 inclusive, and their supporting documents, prepared and/or obtained by the defendants United States of America, James M. Clarke and Melvin J. Burton, or under their supervision, subsequent to and from, through, or as a result of the unlawful copying, photographing and/or examining of the worksheets, workpapers, memoranda,

income tax returns, and/or other documents and papers held by or prepared by and/or under the direction of Donald J. Graf shall be identified by counsel herein as to the nature of the material contained therein, the source thereof, the date acquired, and in every other material respect; the said documents, records, statements, memoranda and/or papers found to have been made and/or prepared by or filed with the defendants James M. Clarke and/or Melvin J. Burton, their employees, agents or representatives, which were obtained or acquired from sources other than come within the suppression order, shall be returned to the said defendants; the said documents, records, statements, memoranda and/or papers contained in the said Court's Exhibit "A" found to have been taken from the defendant Donald J. Graf shall be returned to Donald J. Graf or Dorothy Hinchcliff, as their respective rights thereto shall appear; and the returning of any of the said documents, records, statements, memoranda and/or papers under the provisions of this paragraph to the said James M. Clarke and/or Melvin J. Burton, is not intended to and shall not alter, amend or in any manner affect the order of suppression and prohibition previously set forth herein; and photostats shall be furnished to Dorothy Hinchcliff, individually, or as executrix of the estate of Alfred W. Hinchcliff, deceased, of all exhibits offered in evidence which will be returned to Donald J. Graf, and such of the exhibits as will be returned to the United States of America, and/or James M. Clarke, and/or Melvin J. Burton, except those which were obtained or acquired from sources other than the Donald J. Graf and/or Hinchcliff documents.

s/ GIRARD E. KALBFLEISCH,
United States District Judge.

OPINION OF THE COURT OF APPEALS.

(Filed January 19, 1967.)

No. 16703

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DOROTHY HINCHCLIFF, Individually and as Executrix of the Estate of ALFRED W. HINCHCLIFF, Deceased,
Plaintiff-Appellees,

v.

JAMES M. CLARKE, Internal Revenue Agent and FRANK S. TURBETT, JR., District Director of Internal Revenue,
Defendants-Appellants.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

DONALD J. GRAF,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Ohio.

Decided January 19, 1967.

Before: EDWARDS and PECK, Circuit Judges, and TAYLOR,* District Judge.

EDWARDS, Circuit Judge. We are concerned in these appeals with two cases generally related to the same issues.

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* Honorable Robert L. Taylor, Chief United States District Judge for the Eastern District of Tennessee, sitting by designation.

In the first, the government sought—and was denied—enforcement of an Internal Revenue Service summons addressed to an accountant named Graf. The summons required Graf to produce certain records in his possession pertaining to the income tax problems of his client, Dorothy Hinchcliff, and her deceased husband.

The summons served upon Graf, under authority of Int. Rev. Code of 1954, § 7602, required production of the following:

> "All books, records, work papers, and files pertaining to the above-named taxpayers. These records should include all net worth statements, financial statements, and profit and loss statements, certified or not."

In addition to denying enforcement of this summons, the order of the District Judge for the Northern District of Ohio, Eastern Division, also directed return of certain evidence already acquired by the IRS and enjoined the government from using same or reacquiring it in any manner.

The second action is a complaint filed by Mrs. Hinchcliff in the United States District Court for the Northern District of Ohio which alleged that an IRS agent named Clarke and his IRS District Director were threatening to re-examine the books of account and the income tax returns of the Hinchcliffs for the years 1945 through 1957, that such years had already been examined, and that the re-examination was barred by the Statute of Limitations and by Int. Rev. Code of 1954, §§ 7605(a) and (b), as amended.

The taxpayer sought to quash the administrative summons previously referred to and to suppress any evidence which had previously been (allegedly illegally) turned over to the Department of Internal Revenue by Graf and

to enjoin the government's use of such evidence in any way. The District Judge's order granted the relief sought.

The section of the Internal Revenue Code of 1954 which is relied upon by the taxpayer and the District Judge reads as follows:

> "(b) *Restrictions on Examination of Taxpayer.*— No taxpayer shall be subjected to unnecessary examination for investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary." Int. Rev. Code of 1954, § 7605.

The section of the Internal Revenue Code of 1954 relied upon the government reads as follows:

> "§ 7602. *Examination of books and witnesses*
>
> "For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—
>
> "(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;
>
> "(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such

books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

"(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry." Int. Rev. Code of 1954, § 7602.

At trial the evidence disclosed that Clarke, who works on civil aspects of the Department's endeavors, had been assigned to investigate the return of Mrs. Dorothy Hinchcliff for the years 1957, 1958 and 1959. Prior years as to this taxpayer and her now deceased husband and his estate had previously been reviewed and closed. No letter informing the taxpayer of intention to reopen had been sent by the Commissioner.

In pursuance of this assignment, Clarke went to Graf, a certified public accountant, who had for many years been first a bookkeeper and then accountant for the Hinchcliffs. Clarke testified that he asked Graf to show him his working papers pertaining to the Hinchcliff account and warned him not to give him anything which pertained to the closed years and which represented the taxpayer's own records.

It is, however, undisputed that Graf, in pursuance of this request, turned over something over 100 papers, a substantial number of which were records belonging to the taxpayer, which had been left with the accountant. Some of these pertained to years prior to 1957. It appeared that some word of this reached Mrs. Hinchcliff's lawyer and that he called Graf and protested vehemently against Graf's making any such disclosure of Mrs. Hinchcliff's affairs to the IRS. Whereupon Graf asked for the papers back. Clarke had already had them photostated, but he dutifully took them back and at the same time served on Graf a summons for all of them. The two dates involved here are May 3, 1961, when the papers were turned over

by Graf to Clarke, and May 19, 1961, when Clarke served the summons.

Graf then turned over the documents to Clarke, who sealed them in Graf's office, where they still remain; and this litigation followed.

The government in this appeal argues that § 7605 of the Revenue Code relied upon by the District Judge applies only to "the books of account" in possession of the taxpayer; that a summons, even for the taxpayer's own records which are in the hands of a third party, was wholly appropriate and enforceable, and that a certified public accountant could not be found to be, as the District Judge had found Graf, an employee and agent of the taxpayer so that the taxpayer had standing to object to the summons served on him for her records.

In this regard the government cited and relied on *Deck v. United States*, 339 F. 2d 739 (C. A. D. C. 1964), *cert. denied*, 379 U. S. 967; *In re Fahey*, 192 F. Supp. 492 (W. D. Ky.), *aff'd*, 300 F. 2d 383 (C. A. 6, 1961). These cases do indeed appear to say that the working papers of a public accountant are his own property and can be reached by a summons served on him, even though the information came from a taxpayer client.

Further, there is an Ohio Statute which squarely holds that the working papers of a certified public accountant are his property. 47 Ohio Rev. Code § 4701.19 (1966 Supp.).

Under what we deem to be settled law cited above, it appears clear to us that the documents which are the work product of Graf as a professional accountant clearly may be the subject of a summons and the District Judge was in error in quashing the summons as to these documents.

Further, we believe that the District Judge was in error in holding that Int. Rev. Code § 7605 barred the

summons issued by the IRS, or rendered illegal the visit by Clarke to Graf's office, or his inspection of the documents voluntarily shown him by Graf.

Section 7605 of the Int. Rev. Code by its express language is applicable only to the "taxpayer" and provides a limitation only upon inspection of "a taxpayer's books of account." The notice of reopening provided for is required "after investigation." The logical construction of this section would be that it served as no bar to IRS investigation of closed years where its investigation pertained to information or records in the possession of third persons.

In reaching a similar construction of § 7605, the Second Circuit said:

> "A construction limiting the section to its unambiguous language is not unfair to the taxpayer. It protects him from unnecessary examinations or investigations. An investigation, however, often requires a long period of time. There may be many ramifications which lead into many areas. Each new clue investigated is not a new investigation in a Section 7605(b) sense. A taxpayer cannot properly claim that because IRS has summoned six third parties it cannot summon six additional without showing good cause. The investigation continues until completed as one investigation." *Application of Magnus,* 299 F. 2d 335, 337 (C. A. 2, 1962), *cert. denied,* 370 U. S. 918 (1962).

See also, *In re Magnus, Mabee & Reynard, Inc.,* 311 F. 2d 12 (C. A. 2, 1962), *cert. denied,* 373 U. S. 902 (1963); *Hubner v. Tucker,* 245 F. 2d 35, 38-9 (C. A. 9, 1957).

The congressional purpose, as revealed by the language of the statute, was not to prohibit all investigation of closed income tax accounts, but to guarantee that tax-

payers whose accounts had been closed would not be subjected to "unnecessary" harassment by being required frequently to present their "books of account" to the income tax agency.

What this appellate record discloses as to the documents and papers turned over by Graf to Revenue Agent Clarke is that few if any of them represent what may reasonably be construed as "books of account" of the taxpayer, within the meaning of Int. Rev. Code § 7605.

Since no approach has been made to this taxpayer in person, and since, as we have previously held, an accountant is an independent contractor and not an agent or employee of the taxpayer, we find no violation of the statute in question.

We also believe the District Judge was in error in holding that the summons was issued in violation of the United States Constitution, Amendment IV. Its language followed exactly the language of the authorizing statute, Int. Rev. Code § 7602.

The constitutionality of a summons issued under this statute has been repeatedly upheld. *Eberhart v. Broadrock Development Corp.*, 296 F. 2d 685 (C. A. 6, 1961), *cert. denied*, 369 U. S. 871 (1962); *Foster v. United States*, 265 F. 2d 183 (C. A. 2, 1959), *cert. denied*, 360 U. S. 912 (1959).

This brings us to consideration of the lengthy opinion which the District Judge wrote on the government's motion for rehearing of his original order. In it the District Judge changed his emphasis from the statutory provision previously cited and planted his denial of rehearing primarily on the Fourth Amendment to the United States Constitution and by implication on the Fifth Amendment likewise. In this regard the District Judge placed great reliance on *Boyd v. United States*, 116 U. S. 616 (1886).

The *Boyd* case stands generally for the proposition that the Fourth and Fifth Amendments of the United States Constitution read together forbid judicial warrants for searches and seizures of a person's letters and papers in a search for evidence of fraud against the revenue laws. The District Judge appears to hold that this doctrine is effective in relation to a search for evidence in a civil proceeding for determination of income tax.

The United States Supreme Court has squarely before it at present the problem of whether the Fourth Amendment prohibition on "unreasonable searches and seizures" bars evidence seized pursuant to a lawful search in a criminal proceeding where that evidence constitutes items claimed to have been of evidential value only. *Hayden v. Warden,* 363 F. 2d 647 (C. A. 4, 1966), *cert. granted,* 35 U. S. L. Week 3161 (U. S. Nov. 8, 1966).

Whatever may be the result in the criminal proceedings in the *Hayden* case above, in the instant case we do not deal with a "criminal proceeding." We decline to extend the *Boyd* doctrine to bar an administrative summons for financial records relevant to a civil proceedings for collection of income tax where that summons is authorized by a congressional enactment, and where the constitutionality of the statute has to date been repeatedly upheld.

By brief and at oral argument the IRS seeks to assure this court (as it did the District Judge) that its investigation in the Hinchcliff matter has no purpose of possible criminal prosecution. It may be that such prosecution is effectively barred by the statute of limitations, as suggested by the IRS brief. However this may be, our decision in this case is squarely planted upon the representation made to us. Hence, no information secured as a result of this decision may be employed in any criminal prosecution.

Finally, we note that some 300 papers have been impounded under the administrative summons and that the summons did not follow the 10-day notice rule of § 7605 (a). Prior to the IRS gaining access to these documents, we believe that the District Judge should review them to ascertain whether or not any should be excluded because they are properly to be described as "books of account" of the taxpayer. See Int. Rev. Code § 7605.

If the IRS had followed the 10-day notice requirement of the statute, clearly the taxpayer would have been able to repossess herself of anything properly described as her "books of account."

Reversed and remanded for further proceedings not inconsistent with this opinion.

JUDGMENT OF THE COURT OF APPEALS.

(Caption omitted.)

(Filed January 19, 1967.)

APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the case remanded for further proceedings consistent with the opinion.

No costs awarded. Rule 23(4).

Entered by order of the Court.

CARL W. REUSS,
Clerk.

APPENDIX B.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

CONSTITUTION OF THE UNITED STATES:

Amendment IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

INTERNAL REVENUE CODE OF 1939:

Sec. 275. (53 Stat. 86). Period of limitation upon assessment and collection.

Except as provided in section 276—

(a) *General rule.* The amount of income taxes imposed by this chapter shall be assessed within three years

after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

* * * * *

(c) *Omission from gross income.* If the taxpayer omits from gross income an amount properly includible therein which is in excess of 25 per centum of the amount of gross income stated in the return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 5 years after the return was filed.

* * * * *

(26 U. S. C. 1952 ed., Sec. 275 (a) and (c).)

Sec. 276. (53 Stat. 87). Same—Exceptions.

(a) *False return or no return.* In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

* * * * *

(26 U. S. C. 1952 ed., Sec. 276(a).)

Sec. 293. (53 Stat. 88). Additions to the tax in case of deficiency.

(a) *Negligence.* If any part of any deficiency is due to negligence, or intentional disregard of rules and regulations but without intent to defraud, 5 per centum of the total amount of the deficiency (in addition to such deficiency) shall be assessed, collected, and paid in the same manner as if it were a deficiency, except that the provisions of section 272(i), relating to the prorating of a deficiency,

and of section 292, relating to interest on deficiencies, shall not be applicable.

(b) *Fraud.* If any part of any deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of the deficiency (in addition to such deficiency) shall be so assessed, collected, and paid, in lieu of the 50 per centum addition to the tax provided in section 3612 (d) (2).

(26 U. S. C. 1952 ed., Sec. 293.)

Sec. 3748. (53 Stat. 461). Periods of limitation—(a) Criminal prosecutions.

No person shall be prosecuted, tried, or punished, for any of the various offenses arising under the internal revenue laws of the United States unless the indictment is found or the information instituted within three years next after the commission of the offense, * * * and except that the period of limitation shall be six years—

(1) for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner,

(2) for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof, * * *

* * * * *

(26 U. S. C. 1952 ed., Sec. 3748 (a) (1) and (2).)

INTERNAL REVENUE CODE OF 1954:

Sec. 6501. (68A Stat. 803). Limitations on assessment and collection.

(a) *General rule.* Except as otherwise provided in this section, the amount of any tax imposed by this title

shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) or, if the tax is payable by stamp, at any time after such tax became due and before the expiration of 3 years after the date on which any part of such tax was paid, and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period.

* * * * *

(c) *Exceptions.*—

(1) *False return.*—In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time.

* * * * *

(e) *Omission from gross income.*—Except as otherwise provided in subsection (c)—

(1) *Income taxes.*—In the case of any tax imposed by a subtitle A—

(A) *General rule.*—If the taxpayer omits from gross income an amount properly includible therein which is in excess of 25 percent of the amount of gross income stated in the return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 6 years after the return was filed. * * *

* * * * *

(26 U. S. C. 1958 ed., Sec. 6501 (a), (c) (1) and (e) (1) (A).)

Sec. 6531. (68A Stat. 815). Periods of limitation on criminal prosecutions.

No person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal revenue laws unless the indictment is found or the information instituted within 3 years next after the commission of the offense, except that the period of limitation shall be 6 years—

(1) for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner;

(2) for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof;

* * * * *

(26 U. S. C. 1958 ed., Sec. 6531 (1) and (2).)

Sec. 6653. (68A Stat. 822). Failure to pay tax.

(a) *Negligence or intentional disregard of rules and regulations with respect to income or gift taxes.*—If any part of any underpayment (as defined in subsection (c) (1) of any tax imposed by subtitle A or by chapter 12 of subtitle B (relating to income taxes and gift taxes) is due to negligence or intentional disregard of rules and regulations (but without intent to defraud), there shall be added to the tax an amount equal to 5 percent of the underpayment.

(b) *Fraud.*—If any part of any underpayment (as defined in subsection (c)) of tax required to be shown on a return is due to fraud, there shall be added to the tax an amount equal to 50 percent of the underpayment. In the

case of income taxes and gift taxes, this amount shall be in lieu of any amount determined under subsection (a).

* * * * *

(26 U. S. C. 1958 ed., Sec. 6653 (a) and (b).)

Sec. 7602. (68A. Stat. 901). Examination of Books and Witnesses.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

(26 U. S. C. 1958 ed., Sec. 7602.)

Sec. 7604. (68A Stat. 902; As amended by Sec. 4(i), Act of April 2, 1956, c. 160, 70 Stat. 91, and Sec. 208(d)(4), Highway Revenue Act of 1956, c. 462, 70 Stat. 396). Enforcement of Summons.

(a) *Jurisdiction of District Court.*—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

(b) *Enforcement.*—Whenever any person summoned under Section 6420(e)(2), 6421(f)(2), or 7602 neglects or refuses to obey such summons, or to produce books, papers, records or other data, or to give testimony, as required, the Secretary or his delegate may apply to the judge of the district court or to a United States commissioner for the district within which the person is so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

(26 U. S. C. 1958 ed., Sec. 7604.)

Sec. 7605. (68A Stat. 902; As amended by Sec. 4(i), Act of April 2, 1956, c. 160, 70 Stat. 91, and Sec. 208(d)(4), Highway Revenue Act of 1956, c. 462, 70 Stat. 396). Time and Place of Examination.

(a) *Time and Place.*—The time and place of examination pursuant to the provisions of Section 6420(e)(2), 6421(f)(2), or 7602 shall be such time and place as may be fixed by the Secretary or his delegate and as are reasonable under the circumstances. In the case of a summons under authority of paragraph (2) of section 7602, or under the corresponding authority of section 6420(e)(2), or 6421(f)(2), the date fixed for appearance before the Secretary or his delegate shall not be less than 10 days from the date of the summons.

(b) *Restrictions on Examination of Taxpayer.*—No taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary.

(26 U. S. C. 1958 ed., Sec. 7605.)

47 OHIO REVISED CODE (1966 SUPP.):

Sec. 4701.19. Records.

All statements, records, schedules, working papers, and memoranda made by a certified public accountant or public accountant incident to or in the course of professional service to clients by such accountant, except reports submitted by a certified public accountant or public accountant to a client, shall be and remain the property of such accountant, in the absence of an express agreement

between such accountant and the client to the contrary. No such statement, record, schedule, working paper or memorandum shall be sold, transferred or bequeathed, without the consent of the client or his personal representative or assignee, to anyone other than one or more surviving partners or new partners of such accountant.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1175

DOROTHY HINCHCLIFF, PETITIONER

v.

JAMES M. CLARKE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

This case originated in an application by the government for enforcement of an Internal Revenue Service summons, issued in connection with an investigation of the civil tax liabilities of Alfred W. Hinchcliff (now deceased) and his wife, Dorothy, for the years 1945 through 1960. The district court denied the application and ordered the return and suppression of certain evidence already obtained by the government (Pet. 9a–49a). The court of appeals reversed and remanded with instructions to order compliance with the summons, except as to such documents as the district court might find to be "books of account" of the Hinchcliffs (Pet. 54a–62a). The issues raised in the petition either are not presented by the instant

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record or are not yet ripe for consideration by this Court.

In early 1961 Internal Revenue Agent Clarke was assigned to investigate the Hinchcliffs' returns for 1957, 1958 and 1959, as to which years the normal three year statute of limitations on assessment and collection had not yet expired. Finding discrepancies in these returns, the agent broadened his investigation to include earlier years. (R. 149a–150a, 251a–252a, 318a.) [1] On May 3 the agent asked Mr. Graf, a certified public accountant who had performed accounting services for the Hinchcliffs, for his worksheets and his retained copies of the returns for years prior to 1957.[2] He cautioned Graf that he wanted only records which belonged to him, and that since no "reopening letter" had been sent to Mrs. Hinchcliff with regard to the years 1945–1956, which years had already been examined once, he did not want anything belonging to her.[3] Graf gave the agent approximately 15 documents, which the agent photostated and returned to Graf. (R. 294a–298a, 305a–307a, 317a–321a, 329a, 340a.)

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[1] "R." references are to the appendices of the parties in the court below.

[2] An Ohio statute provides that the work papers of a C.P.A. are his property in the absence of an express agreement to the contrary. 47 Page's Ohio Rev. Code Ann. (1966 Supp.) § 4701.19.

[3] 1954 Code § 7605(b) provides that "only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary." See generally *United States* v. *Powell*, 379 U.S. 48.

Approximately a week later, Mrs. Hinchcliff and her attorney, Mr. Clyne, demanded that Graf turn over everything he had pertaining to the Hinchcliffs, and Clyne threatened Graf with legal action[4] (R. 133a, 168a–169a). Thereafter the agent served Graf with the summons for the production of his papers which gave rise to the present proceeding[5] (R. 18a, 126a). Since both the agent and Graf recognized that there might be a dispute as to the ownership of some of the documents, they placed in sealed containers those papers which Graf believed to be his, and Graf returned to Mrs. Hinchcliff other books and records which belonged to her (R. 123a–143a, 150a–152a, 182a–183a, 222a, 297a–298a, 302a–303a, 319a–321a, 323a–324a, 329a).

On May 24 Agent Clarke instituted the present proceeding by filing with the United States Commissioner an application for an order directing Graf to comply with the summons by production of the sealed documents. Mrs. Hinchcliff was allowed to intervene and she also filed a complaint for an injunction against the agent in the district court. The two proceedings

[4] Agent Clarke had originally been referred to Graf by Clyne. There was some conflict in the testimony as to Graf's instructions: Graf testified that both Clyne and Mrs. Hinchcliff told him to give the agent anything he wanted; Clyne, on the other hand testified that his conversation with Graf had not involved years previous to 1957, as to which the statute of limitations had run in the absence of fraud. See 1954 Code § 6501(c). (R. 148a–150a, 152a–154a, 169a–173a, 180a, 251a, 253a.)

[5] Although the summons was broadly worded, the government has always taken the position that it required Graf to produce only those documents which belonged to him, including his copies of documents he had used (R. 147a–148a, 198a, 259a–260a, 311a).

were consolidated for hearing and disposition by the district court. (R 3a, 15a–22a, 30a–36a, 49a–52a, 113a–114a.)

The district court, relying upon the testimony of Graf and Agent Clarke as to their conversations, and without resolving conflicts with Clyne's testimony (R. 73a–74a), concluded that the agent had violated the provisions of § 7605 (a) and (b) of the Internal Revenue Code [6] by examining the Hinchcliffs' records for the years 1945–1956 without sending a "reopening letter" and by serving upon Graf a summons which called for immediate compliance (R. 74a–75a). The court found that some of the papers in the sealed boxes belonged to the Hinchcliffs, while others belonged to Graf (R. 84a), but the court concluded that the only effective remedy was to bar the government from using any of the papers or from ever reacquiring them (R. 75a–79a, 102a–110a, 117a–118a).

The court of appeals reversed. It held that Agent Clarke, in his dealings with Graf and in his issuance of the summons, had not violated § 7605(b), because that section requires the issuance of a "reopening letter" only when the Internal Revenue Service desires to reexamine a "taxpayer's books of account" which are in his possession (Pet. 58a–60a). The court also held that "few if any of [the documents given by Graf to Agent Clarke] represent what may reasonably

[6] Section 7605(a) provides that "In the case of a summons under authority of paragraph (2) of section 7602 * * * the date fixed for appearance before the Secretary or his delegate shall not be less than 10 days from the date of the summons." Section 7605(b) is quoted *supra*, fn. 3.

be construed as 'books of account' of the taxpayer" (Pet. 60a). However, since there was a possibility that some of the Hinchcliffs' "books of account" might be involved, and since Mrs. Hinchcliff might have recovered possession of those if the summons to Graf had complied with the 10-day notice provision of § 7605(a) (see *Reisman* v. *Caplin*, 375 U.S. 440, 446, 449–450), the case was remanded to the district court to determine whether any of the Hinchcliffs' "books of account" are among the impounded documents (Pet. 60a, 62a).

1. Petitioner first urges (Pet. 3–4, 13–21) the Court to grant the present petition in order to determine whether unconstitutionally seized evidence may be used in civil or administrative proceedings.[7] However, this issue is not raised by the record in the instant case. In the first place there was no unreasonable search or seizure; everything obtained by the agent from Graf was turned over voluntarily. Moreover, the court of appeals has upheld enforcement of the subpoena only as to those documents which belonged to Graf, remanding to the district court for a determination as to which documents belong to the Hinchcliffs. As to the documents which belonged to Graf, there is no

[7] Agent Clarke's investigation led him to conclude that, for the period from 1945 through 1959, the Hinchcliffs' returns had understated taxable income by at least $400,000 (R. 200a–213a). The record does not indicate to what extent this estimate depended on the documents obtained from Graf (R. 330a, 335a). No criminal prosecution is possible since the six year statute of limitations has run (1954 Code § 6531) and Mr. Hinchcliff is dead.

longer any dispute that these were legally obtained by the government.[8]

2. Petitioner also argues that enforcement of the summons as to any documents which belonged to the Hinchcliffs would violate § 7605 (a) and (b) because of the failure to give Graf 10-days' notice and the lack of a "reopening letter" to Mrs. Hinchcliff (Pet. 3–4, 21–22). This issue, however, is not ripe for consideration by this Court. The opinion of the court of appeals stated that "few if any of [the documents] represent what may reasonably be construed as 'books of account' of the taxpayer" (Pet. 60a) and remanded to the district court for a determination of that question. On the present state of the record there is, therefore, no final finding as to the ownership of the records in the sealed boxes nor as to which are "books of account" within the meaning of § 7605(b). Until these determinations are made, there is no assurance that petitioner will be aggrieved by the court of appeals' decision. Review by this Court is thus not appropriate at this time.

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[8] The district court suppressed the records which belonged to Graf (R. 76a–79a) because, in its view, they were inextricably bound up with an illegal seizure of records belonging to the Hinchcliffs. The implicit rejection of this ruling by the court of appeals (Pet. 58a–60a) was clearly correct (see *Wong Sun* v. *United States*, 371 U.S. 471, 488; *United States* v. *Poller*, 43 F. 2d 911 (C.A. 2)), and the petition does not argue the point.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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